TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 29

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED MARCH 10, 1924

(29,466)

(29,460)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 29

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

	Original	Print
Record from the Court of Claims	1	1
History of proceedings	1	1
Amended and supplemental petition	1	1
General traverse	11	6
Argument and submission	11	6
Findings of fact	12	6
Conclusion of law	18	12
Memorandum of the court	18	12
Appendices A and B—Advertisements	20	13
Appendices C and D—Proposals	28	21
Judgment	33	25
Proceedings after entry of judgment	33	25
Petition for and order allowing appeal	34	26
Clerk's certificate	35	26

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1924

[fol. 1] **IN COURT OF CLAIMS**

No. 33239

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On April 26, 1916, the plaintiff filed its original petition.

On October 11, 1917, by leave of court, the plaintiff filed an amendment to the petition.

Subsequently, to wit, on January 9, 1922, by leave of court, Plaintiff filed an amended and supplemental petition. Said petition is as follows:

II. AMENDED AND SUPPLEMENTAL PETITION—Filed January 9, 1922

Petitioner files this, its amended and supplemental petition, to take the place of its original petition filed on April 26, 1916, and an amendment thereto filed on October 11, 1917, and says:

I

Petitioner is a corporation organized under the laws of the State of Kentucky, owning and operating a system of railroads in the States of Kentucky, Indiana, Illinois, Virginia, Tennessee, Georgia, Alabama, Florida, Mississippi and Louisiana. One of the petitioner's lines traverses the State of Alabama from north to south and extends thence, crossing the State of Mississippi and a part of the State of Louisiana, to the city of New Orleans. In Alabama it passes through Birmingham, Decatur and Flomaton, inland points north of the city of Mobile, and through Mobile itself, which is, and at the times [fol. 2] of the events hereinafter stated was, a port both for export and for coastwise traffic, and in Mississippi it passes through the towns of Pascagoula and Gulfport. At Flomaton it connects with another of petitioner's lines, which extends thence to River Junction, in the State of Florida, passing, in Florida, through the city of Pensacola, which also is, and was, a port both for export and for coastwise traffic. From Decatur to Flomaton said north-and-south line was built with aid of public lands granted by Congress to divers predecessors in title to petitioner, but no other part of said line received such aid. Said line from Flomaton to River Junction was built throughout with aid of such grants.

II

After said lines of railroad were built, but before any of the events mentioned hereinafter, the industry of coal mining began to be

developed in the northern part of the State of Alabama, and petitioner has endeavored to aid the expansion of said industry. To facilitate the export of coal from Mobile and Pensacola it built switching tracks, extending from its said lines, to wharves at which there were hoists and other apparatus for the loading of coal into ships; such tracks not being used in any traffic of any kind which passed through said cities on petitioner's said lines. No aid of any kind was received from the United States in the building of said switching tracks or said wharves or said hoisting apparatus. Said wharves and hoisting apparatus were, and are, operated at Pensacola by petitioner, but at Mobile by a separate corporation.

Such coals, when exported from Alabama and sold in foreign markets, or when shipped to and sold in Texas or Florida markets, competed with coals mined and shipped from other regions, and, in order to enable the sellers of the Alabama coals to meet such competi- [fol. 3] tion successfully, petitioner has allowed and does allow them, on the transportation to Mobile or Pensacola, special rates so low as to afford petitioner very small margins of profit. A tariff for general coal traffic was issued by petitioner, becoming effective on January 30, 1912, being entitled "L. & N. R. R. Tariff, G. F. O. No. 1791; I. C. C. No. A-12137," and supplements to the same, numbered 42, 44, 45, 46, 47, 49, 50 and 51, were afterward issued, becoming effective on February 7, 1915, April 13, 1915, April 15, 1915, May 4, 1915, May 29, 1915, June 6, 1915, June 16, 1915, and July 8, 1915, respectively. By said tariff, so supplemented, rates were stated from some points to Mobile or Pensacola on export coal and coal "for movement to Galveston and other Texas points accessible by water or to Tampa, Punta Gorda and other Florida points accessible by water."

Said tariff and supplements contained other special provisions, with respect to spotting and hoisting charges and other matters, applying to shipments originating on other railroad lines than petitioner's and from which therefore petitioner did not receive the entire earnings.

Said tariff and said supplements thereto were all filed with and approved by the Interstate Commerce Commission.

III

In the month of March and latter months of the year 1915, and in 1916 and 1917, numerous shipments of coal, as shown by bills of particulars filed in this case, were made to Mobile and Pensacola over petitioner's said lines. The shipments were made from Birmingham or points near thereto on branch lines of petitioner which were equivalent thereto for the purposes of the rates stated in said tariff, or still other points on lines of other owners connecting there with petitioner's said main line, all of said points of shipment being [fol. 4] in what is named, by commercial and railroad usage, the "Birmingham District." All of such shipments passed through Flomaton. None of such coals were for export or for reshipment by water or otherwise to any Texas or Florida points and none were for sale in any markets. In one case the coals were for the use of a

ship of the United States navy. The other coals all were for uses of the Corps of Engineers of the United States army in river or harbor improvements at or near to Mobile or Pensacola or at or near to Pascagoula and Gulfport, in Mississippi, or Fort Morgan, in Alabama, to which latter points transportation from Mobile was by Government barges. In all of said shipments the cars were switched and spotted and the coal hoisted at said ports upon the tracks and by the apparatus hereinbefore described. The rates applicable by said tariff and said supplements between said points of shipment and Mobile or Pensacola ranged from $1.00 to $1.15 per ton on coal to be exported or to be reshipped for commercial uses to said Texas or Florida points and $1.10 to $1.25 per ton on coals shipped for other uses.

IV

Said coal supplies for re-shipment to Pascagoula, Gulfport or Fort Morgan and some of said supplies for final delivery at Mobile were obtained by a contract of date March 15, 1915, between the district officer of the United States Corps of Engineers in charge at Mobile, and the Gulf States Coal Company. The others of said supplies for delivery at Mobile were obtained by a contract between said officer and the Imperial Coal Company of date August 21, 1916. Said companies were producers of coal in said "Birmingham District." The coals shipped to Pensacola were purchased under in- [fol. 5] formal offers of other miners of coal in said district, or coal dealers in Pensacola, one purchase being made by the Paymaster of the United States naval vessel Tonopah and all the others by the district officer of said Corps of Engineers in charge, whose office was at Montgomery, in the State of Alabama. Said two formal contracts and said informal purchases of said district engineer at Montgomery were all subject to specifications prescribed by the War Department which provided that the sellers should have charge of and responsibility for the coals until the same should reach the destinations named, and there should load them into barges of said engineer corps by which they were to be transported to points of actual use; that laboratory tests and analysis of each shipment of coal should be made and at destination each shipment should be visually inspected by an officer of said corps, and that any coals which did not satisfy the requirements of the specifications, or which such inspecting officers for any reason did not approve, would not be accepted and should be removed by or at the cost of the sellers from the premises of the United States at the destinations. With respect to said purchase for the steamship Tonopah like requirements were made by an invitation upon which said accepted offer was based. The two formal contracts, for deliveries at Mobile, also contained similar provisions.

V

Regarding all of said supplies of coal invitations for bids were issued by said officers of the United States and it was pointed out therein that there would be a large saving to the United States, in cases of shipment over land-aided lines of railroad, if the coals were

purchased at points of shipment, and bidders were directed to submit [fol. 6] prices in the alternative for delivery (1) at points of shipment and (2) at destinations. In the bids submitted the prices for delivery at destinations exceeded the prices for delivery at points of shipment by approximately the amounts of the freight rates. In said contracts of the Gulf States Coal Company delivery at Mobile was stipulated and the price was fixed at the price named therefor. In the contract of the Imperial Coal Company and in said informal offers the propositions and prices accepted were for delivery on board cars at points of shipment. Upon all of the shipments, whether under said formal contracts or said informal offers, the freight charges were paid by the United States and were computed upon the basis of said land-grant from Decatur to Flomaton or to Pensacola. Thus, although the United States had no property in and was not concerned in any way with the coals while in transit, it, in violation of petitioner's rights and of the terms of the land-grants as fixed by the adjudications, profited to the amounts of the land-grant abatements appurtenant to said railroad mileage.

VI

In all of said shipments inspection in fact was made by United States officers at Mobile or Pensacola and samples were taken which were subjected to laboratory tests at Birmingham or at Washington City, and the coals were not accepted until they had been so inspected and the results of such tests were known.

VII

All of the shipments were made on bills of lading, made up by the consignors, on a form prepared by officers of the United States, which, by regulations of departments of the Government, was to be [fol. 7] used exclusively in shipments of Government property, and therefore was known in railway offices as "Government bill of lading." The blank bills of lading had been furnished to the consignors by the officers of the United States having authority over the transportation. The complete bills of lading were receipted, or "accomplished," by Government officers at the points of delivery.

VIII

Petitioner's officers who received said freights for shipment and those who made claim upon disbursing officers of the United States for payment with respect thereto had no information or suggestion regarding the ownership of the coals, when the same were shipped or when they made their bills, except what was conveyed by said use of Government bills of lading. Assuming that said coals, while in course of transportation, already belonged to the United States, petitioner's accounting officers in preparing their bills made deductions with respect to the land-grant to petitioner's lines from Birmingham to Flomaton or to Pensacola. Said bills were computed, on all deliveries at Mobile, whether for use at that point or at Pascagoula or

Gulfport or Fort Morgan, and on all deliveries at Pensacola, on the basis of full tariff rates. The net rates resulting from the land-grant deductions were all far below $1.00 per ton; and therefore in said bills petitioner's officers made charges of 10 cents per ton for said switching and spotting of cars.

IX

Settlement on said bills was made by the Auditors for the War or Navy Departments, and they disallowed, and refused to pay to petitioner, the amounts stated for spotting and shipping charges; and on [fol. 8] appeal their said action was approved by the Comptroller of the Treasury. Petitioner accepted payment of such reduced amounts and made protest against the same, reserving its claim to additional compensation.

X

In each of said shipments to Mobile a part of the coals were for use at that point and another part, or other parts, were to be forwarded to and used at or near to Pascagoula, Gulfport or Fort Morgan. In a proper case the land-grant deduction on shipments from such points to Mobile is 36.99 per cent of the gross rate, leaving, out of $1.10 per ton, a net rate of 69.3 cents, and, out of $1.00 per ton, a net rate of 63.01 cents per ton; and on shipments to Pensacola the deduction and the net rate each is 50 per cent of the gross rate, so that there was payable, net, out of $1.10 per ton, a net rate of 55 cents per ton. In petitioner's said bills, with respect to all of said shipments to Mobile, whether for use there or at said other points, land-grant allowances were stated, calculated by the uniform application of said net rate of 69.3 cent-, and with respect to the shipments to Pensacola, by making a deduction of 55 cents, there was applied said equal net rate of 55 cents. In the computations by the Auditor for the War Department a gross rate of $1.10 was applied on the part-shipments for use at Mobile and on the part-shipments to Pascagoula, Gulfport or Fort Morgan a gross rate of $1.00 was applied, and so necessarily a separate calculation for the land-grant was made on the several parts of those shipments.

XI

The total of the land-grant deductions made by the Auditor for the War Department on the shipments to Mobile for use at other [fol. 9] points, as shown by paragraph X was $5,107.49 and the rate of such deductions being 36.99 per cent, the gross compensation (100 per cent) out of which the deductions were made, computed, as stated at $1.00 per ton, was $13,807.76, and at the rate of $1.10 per ton the amount is $1,380.78 more.

XII

The amounts of the land-grants reductions involved in said payments made to petitioner, described in paragraph IX hereinbefore,

are: under the Gulf States Coal Company contract, $5,119.63; under the Imperial Coal Company contract, $5,566.02; on engineer shipments to Pensacola, $1,778.13; on navy shipments to Pensacola, $150.30. The amount of the reduction made by change of rate, described in paragraph X hereinbefore, is $1,380.78; making a total of reductions of $13,994.86. The aggregate amounts of the spotting and hoisting charges deducted, as narrated in paragraph VIII hereinbefore, is $5,620.70.

Petitioner says all of said coals were the property, while in transit on petitioner's railroad lines, of the shippers thereof and not of the United States, and therefore they were not lawful subjects of land-grant reductions from the rates of petitioner's said tariff, and petitioner therefore claims of the United States the sum of said reductions, to wit, $12,614.08, plus said sum of $1,380.78, withheld from it by the application of a wrong gross rate. But if said coals while in transit were the property of the United States and said land-grant reductions were truly due with respect thereto and the net revenue accruing to petitioner from said shipments was less than $1.00 per ton, then claimant says it should have and recover of the United [fol. 10] States the sum of said spotting and hoisting charges, to wit, $5,620.70, plus said $1,380.79.

The Louisville and Nashville Railroad Company, by Benj. Carter, Its Attorney in Fact.

Jurat showing the foregoing was duly sworn to by Benj. Carter omitted in printing.

[fol. 11] III. General Traverse

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

IV. Argument and Submission of Case

On March 20, 1922, this case was argued and submitted by Mr. Benjamin Carter, for the plaintiff, and Mr. Perry W. Howard, for the defendant.

[fol. 12] **Findings of Fact, Conclusion of Law, Memorandum by the Court, and Appendices A, B, C, D.**—Filed May 1, 1922

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact

I

The plaintiff is, and was during the different transactions hereinafter set out in these findings, a corporation duly incorporated under

the laws of the State of Kentucky, owning and operating a system of railroads in the States of Kentucky, Indiana, Illinois, Virginia, Tennessee, Georgia, Alabama, Florida, Mississippi, and Louisiana. One of the plaintiff's lines traverses the State of Alabama from its northern boundary south through Decatur and Birmingham to Flomation, Ala., thence, still south, through western Florida, to Pensacola, a port of export and coastwise traffic on the Gulf of Mexico, thence in an easterly direction to River Junction, Fla. This line was constructed from Decatur, Ala., to River Junction, Fla., by the aid of public lands granted by the United States. (Acts of May 17, 1856, June 3, 1856, and March 3, 1857 (11 Stat. 15, 17, 200); April 10, 1869, and March 3, 1871 (16 Stat. 45, 580); March 3, 1875 (18 Stat. 509). From Flomaton to Mobile, Ala., also a port of export and coastwise traffic on the Gulf of Mexico, another line of plaintiff's system runs in a southwesterly direction, and was built without Government aid.

II

After development of coal mining began in northern Alabama, in order to facilitate the exportation of coal from Mobile and Pensacola, the plaintiff, without assistance from the Government, constructed wharves with hoists thereon for loading coal on vessels and barges, and switches from its main lines to said wharves. The wharves and hoists at Pensacola were operated by plaintiff and at Mobile by the Mobile Coal Co.

[fol. 13]

III

During the years 1915, 1916, and 1917, when the coal in question was transported over plaintiff's lines via Birmingham and Flomaton to Mobile, Ala., and Pensacola, Fla., the following published tariff rates filed with the Interstate Commerce Commission were in force: Louisville & Nashville G. F. O. 1791; I. C. C. 12137, effective January 30, 1912.

[In cents per ton of 2,000 pounds.]

		From groups—		
		1	2	3
Mobile, Ala. Pensacola, Fla.				
Coal for bunkerage and purposes other than export	L. & N. R. R.	110	110	115

The above tariff was modified by Supplement No. 42, note 4-B, effective February 7, 1915, the material parts of which read: "Coal for bunker use and for coastwise and export movement at or via Mobile, Ala., and Pensacola, Fla."

(c) On coal paying the Louisville & Nashville Railroad to Mobile, Ala., and Pensacola, Fla., a road haul revenue of $1 per ton of 2,000 pounds or more, the cost of transferring the coal from cars onto barges or into vessels through the hoist of the Mobile Coal Co. (Mobile, Ala.), and Louisville & Nashville Railroad Co. (Pensa-

cola, Fla.), will be assumed by the Louisville & Nashville Railroad Co.

(d) On coal paying the Louisville & Nashville Railroad to Mobile, Ala., and Pensacola, Fla., a road-haul revenue of less than $1 per ton of 2,000 pounds, the cost of transferring coal from cars onto barges or into vessels will be 10 cents per ton of 2,000 pounds, plus $2 per car switching, or spotting, charge in addition to the freight rate, subject, however, to a maximum total charge of $1 per ton of 2,000 pounds, including transportation and hoisting and switching (or spotting) service.

The coal hereinafter described as transported over plaintiff's lines to Mobile and Pensacola came from mines near Birmingham, which were scheduled in plaintiff's tariffs as in Groups 1 and 2, and if not for export or coastwise traffic was charged for at the rate of $1.10 per ton of 2,000 pounds.

IV

On March 15, 1915, the Gulf States Coal Co. entered into a contract with the United States, through Lieutenant Colonel Keller of the United States Engineers Corps, to furnish and have delivered, when requested, 18,000 short tons of coal from the Dixiana mines onto United States barges, or in bunkers, in carload lots, from hoists at Mobile, Ala., at $1.38 per short ton, the United States to pay the freight thereon and the contractor to transfer the coal at its expense to the barges. The specifications provided for inspec- [fol. 14] tion of the coal, either when it was loaded on the cars or when it was unloaded therefrom. A copy of the contract is attached to these findings as Appendix A and is made part of this finding by reference thereto.

V

The coal under the above contract was shipped over plaintiff's lines to Mobile on Government bills of lading, which were accomplished, the coal inspected and accepted at that place, and none of it appears to have been rejected. Part of the coal was delivered for Government engineering work at or near Mobile, and part was switched to wharves of the Mobile Coal Co. and loaded from its hoists onto Government barges, which were towed by Government tugs to Fort Morgan, Ala., Pascagoula, Miss., and Gulfport, Miss., places on the Gulf coast west of Mobile, where it was to be used for Government engineering work near those places. The transportation of the coal to be used at Mobile was paid for by the Government at the basic rate of $1.10 per short ton, and that to be used near Fort Morgan, Pascagoula, and Gulfport at the basic rate of $1 per short ton, with land grant deductions therefrom.

The plaintiff rendered its bills to the Government, for auditor's settlement, on the approved form of voucher for transportation, land grant involved, upon which it stated the basic rate and the amount to be deducted on account of land grant and claimed the net amount remaining after the deduction of land grant. In no case did it claim payment upon other than a land-grant basis, but it

included in its bills and claimed switching, or spotting, and hoisting charges.

The land-grant deductions for coal to be used at Mobile amounted to $2,941.80, and for coal to be used at the other points to $2,177.83, or a total of $5,119.63, and the hoisting charges $1,317.10, and the switching charges $550, or a total of $1,867.10.

The auditor disallowed the switching and hoisting charges, but otherwise allowed the claims as filed except that on two shipments on bills of lading numbered 24451 and 24452 the auditor determined the basic rate to be $1 per ton instead of $1.10 per ton, as claimed, and corrected the land grant accordingly.

VI

The plaintiff company protested the disallowance of the switching and hoisting charges in settlements made by the auditor, except as to settlements set out in finding XIII as to which no protests of any kind were made, and protested also the application of the $1 per ton basic rate instead of the $1.10 per ton rate on bills of lading 24451 and 24452, and as to the disallowances in the auditor's settlement covering these two bills of lading the plaintiff applied to the Comptroller of the Treasury for a revision of the settlement.

The plaintiff claimed that it was entitled to the switching and hoisting charges because the road haul revenue after the deduction of land grant was less than $1 per ton, and upon the other point, that the $1.10 basic rate was applicable to these shipments under the provision of the tariff.

[fol. 15] The comptroller affirmed the action of the auditor, holding that under supplement to former tariff the $1 rate was the proper rate on shipments to the points involved and that plaintiffs were not entitled to switching and hoisting charges on the ground claimed because charges for Government transportation are based upon commercial rates from which land-grant deductions follow by operation of law.

VII

On August 21, 1916, the Imperial Coal & Coke Co. entered into a contract with the United States through Major Schulz, of the United States Engineer Corps, by which it agreed to deliver on the railroad cars at its mines at Dixiana, Ala., approximately 12,000 tons of coal at $1.50 per ton of 2,000 pounds. The specifications provided for adding the land-grant freight rate from the mines to Mobile to the price bid for mine delivery for comparison of bids, and that the coal should be inspected when loaded on cars or unloaded therefrom, and the contract provided that the coal should be subject to rejection until final inspection and acceptance. This contract is attached to these findings as Appendix B and is made part of this finding by reference thereto.

VIII

The coal under the second contract was also shipped on Government bills of lading over plaintiff's lines to Mobile, the bills of lading

accomplished, and the coal inspected and accepted at that place by the proper Government officials, and none of it appears to have been rejected. Part of this coal was also delivered for use on Government engineering work at or near Mobile, and part was switched to the wharves and loaded on Government barges and towed by Government tugs to Fort Morgan, Ala., Pascagoula and Gulfport, Miss., for use on engineering work near those places. The freight on the coal for use at Mobile was paid for at the rate of $1.10 per short ton, and that for use at the other places mentioned at $1 per short ton.

The plaintiff in stating its bills made land-grant deductions and claimed the net amount after making such deductions, as it had done in its claims for shipments made under the Gulf States Coal Co. contract, and also claimed switching and hoisting charges which latter were disallowed by the auditor, but the bills were otherwise allowed and paid as rendered.

The percentage of land-grant deductions from the total gross commercial charges amounted to 38 per cent, and on a freight rate of $1 per ton the plaintiff received 62 cents net per ton, and on $1.10 per ton it received 68.2 cents net per ton under both contracts.

The land-grant deductions under this contract for coal to be used at Mobile amounted to $2,636.36, and for coal to be used at the other places to $2,929.66, or a total of $5,566.02, and the hoisting charges to $1,448 and the switching charges to $642, or a total of $2,090.

IX

The total land-grant deductions for coal to be used at Mobile under both contracts amounted to $5,578.16; the total land-grant deductions for coal to be used at Fort Morgan, Pascagoula, and Gulfport [fol. 16] under both contracts amounted to $5,107.49; and the total hoisting and switching charges for coal shipped to Fort Morgan, Pascagoula, and Gulfport amounted to $2,951.10.

The difference between the payments of freight on coal shipped to Fort Morgan, Pascagoula, and Gulfport and that shipped to Mobile was 10 cents per ton, or a total of $510.75.

X

There was purchased on advertisements, specifications, bids, and acceptances in the Birmingham district 7,540 tons of coal of 2,240 pounds, as follows: November 2, 1914, 2,000 tons of Old Pratt coal, from the Tennessee Coal, Iron & Railroad Co., of Birmingham, at $1.80 per ton, to be shipped on Government bills of lading via routes to be shown thereon; on October 20, 1915, 5,000 long tons of Old Pratt coal from the same company, at $1.75 per ton, to be shipped on Government bills to 10 probable points, the first named being Pensacola, Fla.; on May 24, 1917, from Cary & Co., of Pensacola, 40 long tons of Old Belle Ellen coal, at $4.50 per ton, to be shipped on Government bills of lading to the engineer officer at Pensacola for testing; on September 10, 1917, from Cary & Co., 500 tons of Old Belle Ellen coal, at $3.14 per ton, to be shipped on Government bills of lading to the engineer officer at Pensacola.

The form of advertisements and the proposals and acceptances are attached to these findings as Appendix C and are made a part of this finding by reference thereto. The specifications are the same as those in Appendix A.

XI

Part of the coal purchased as above, without a formal contract, was shipped to Pensacola on plaintiff's lines during the years 1916 and 1917, on Government bills of lading, which were duly accomplished, and the coal inspected and accepted at Pensacola by the proper Government officials. The said coal was for use at or near Pensacola, and was paid for at the rate of $1.10 per ton. The land-grant deductions on said coal amounted to $1,773.23, the hoisting charge amounted to $350.30, and the switching charges to $164, or total switching and hoisting charges of $514.30. The percentage of land-grant deductions from total gross commercial charges amounted to 48 per cent and the net revenue to the plaintiff was 62 cents net per ton.

XII

On April 8, 1915, the assistant paymaster on the U. S. S. *Tonopah*, at the naval station, Pensacola, sent an invitation to bid and a blank proposal to the Zimmern Coal Co., of Pensacola, to furnish 250 long tons of coal to be delivered alongside of said vessel at Pensacola on April 20, 1915, free of charge, subject to the usual inspection and test. The Zimmern Co.'s bid was $3.50 per long ton, or if Government bills of lading should be furnished, $2.36 per long ton, the coal to come from the Imperial Coal & Coke Co.'s mines at Dixiana, Ala. The bid of the Zimmern Coal Co. at $2.36 per long ton was accepted and Government bills of lading were furnished for the shipment of the coal involved.

[fol. 17] The coal was transported on plaintiff's lines and the land-grant deductions made were $153.30 (the amount claimed in the petition is $150.30); the hoisting charges were $29.79, and the switching charges $16, or a total of $45.79. The invitation to bid and the proposal as filled out are attached to these findings as Appendix D, and are made part of this finding by reference thereto.

XIII

The pjlaintiff did not in any respect protest against settlements for transporting coal to Mobile under the contract with the Gulf States Coal Co. on bills of lading numbered 24471, 24472, 24474, 24476, 24477, 24478, 24480, 24484, 24483, 24481, 24487, 24488, 24485, 24491, 24494, and 26761, in which the land-grant deductions amounted to $2,921.80, the hoisting charges to $747.71, and the switching charges to $320; nor against settlement for transporting coal to Mobile under the contract with the Imperial Coal & Coke Co. on Government bills of lading numbered 26752, 26754, 26758, and 26762, in which the land-grant deductions amounted to $290.72, the hoisting charges, $70.99, and switching charges, $34; nor against settlement for transporting coal to Pensacola on Government bills

of lading numbered 29358 and 29384, in which land-grant deductions amounted to $223.80 and hoisting charges to $44.76 and switching charges to $20.

The total land-grant deductions, against which no protests were made, amounted to $3,435.78, and the total charges for hoisting and switching, against which no protests were made, amounted to $1,237.46, and the total land-grant deductions, hoisting and switching charges, against which no protests were made, amounted to $4,673.24.

In all cases other than those above referred to in which there were no protests, the plaintiff's protests were limited to the disallowances of switching and hoisting charges and the adoption of the $1 basic rate instead of the claimed $1.10 rate as to the shipments covered by bills of lading numbered 24451 and 24452.

XIV

The regulations of the Treasury Department in force at the time the coal in question was hauled provided that Government bills of lading were to be issued for the transportation of Government property only. That prepayment of charges in no case was to be demanded by the carrier, nor collected from the consignee. That presentation to the officer indicated on the face of the bill of lading, when properly accomplished, and attached to the freight voucher prepared on the authorized Government form, payment was to be made to the last carrier, unless otherwise specifically stipulated. That when shipments were made under contract or special rates notation of such fact should appear on the face of the bill of lading. That shipments were required to be made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate was available, unless otherwise indicated on the face of the bill of lading.

[fol. 18]

XV

There is no evidence in the record as to plaintiff's knowledge of the terms of any or all of the contracts or orders here involved or proving or tending to prove that it was deceived, misled, or mistaken as to any material fact or that it did not act, in presenting its bills at land-grant rates, with full knowledge of all the facts.

CONCLUSION OF LAW

Upon the facts found the court concludes as matter of law that the plaintiff is not entitled to recover, and its petition herein ought to be and it is dismissed with judgment against plaintiff for cost of printing, to be taxed and collected by the clerk.

MEMORANDUM

All of the coal here involved was contracted for or ordered on the basis of mine delivery, except that bought under the contract with the Gulf States Coal Co., and the fact that inspection was provided for at point of delivery or some duty in relation thereto imposed upon the contractor does not require another conclusion.

The Gulf States Coal Co. contract is to be construed as for delivery at destination with obligation to the contractor on the part of the United States to pay the freight.

The fact that in rendering all its bills the plaintiff made land grant deductions and claimed only the net land grant rate, arrived at by deducting land grant from commercial rates, and accepted payment on that basis without protest precludes the right to assert a further claim for the same service in the absence of a showing of fraud or mistake of fact, as to which the record is silent. The mere use of Government bills of lading can not avail plaintiff. (B. & O. Case, 52 C. Cls. 468; Oregon-Wash. Case, 54 C. Cls. 131; affirmed, 255 U. S. 339.)

Upon the facts all shipments except those made under the Gulf States Coal Co. contract were subject to land-grant deduction. As to shipments under that contract, aside from the effect of the presentment and settlement of bills on a land grant basis as stated above, if these shipments were not subject to land-grant deductions because not Government property, there is, as between the plaintiff and the United States, no liability on the latter to pay any freight at all.

On all of these shipments the road haul revenue at commercial rates was $1 per ton or more, the condition under which the shipper was entitled to switching and hoisting without charge. The fact that proper land-grant deductions reduced the actual cash receipts for said shipments to less than $1 per ton can not deprive the United States of the same right to switching and hoisting without charge as would accrue under the tariff to a private shipper paying full commercial rates. The amounts by which the cash receipts, by reason of [fol. 19] land grant deductions, were reduced below $1 per ton had been theretofore paid by grants of lands and the "revenue" to the plaintiff was the aggregate of the cash paid and the determined value, in relation to said shipments, of the land grant. Government rates over land-aided roads are always predicated on commercial rates from which deductions follow by operation of law in return for benefits conferred, the conditions imposed by the land-grant acts and the acceptance of the grants thereunder partaking of the nature of a contract, and land-aided roads, having accepted the benefits conferred, may not by constructing or construction of tariffs deprive the United States of the benefits stipulated for as the consideration of the gratuity.

The application of the $1 per ton basic rate on shipments made on bills of lading 24451 and 24452, under the Gulf Coal Co. contract, was, so far as appears of record, correct.

[fol. 20]

APPENDIX A

Advertisement

U. S. Engineer Office,
Mobile, Ala., January 20, 1915.

Sealed proposals for furnishing about eighteen thousand (18,000) tons of bituminous coal and 9,000,000 gallons of fresh water will

be received at this office until 11 a. m., February 8, 1915, and then publicly opened. Information on application.

C. Keller, Lieut. Col., Engineers.

16. Payments.—Payments will be made monthly for coal and water delivered and accepted, in acordance with paragraphs 46, 47, and 50 of these specifications. A percentage of ten (10) per centum will be reserved from each payment until completion of the contract.

Detailed Specification

19. Place of Delivery.—With a view to permitting the United States to take advantage of the reduced freight rates which apply to shipments of Government property over the main lines of the Louisville and Nashville Railroad Company between Decatur and Flomaton, Ala.; the Alabama Great Southern and Mobile and Ohio Railroad practically from the north boundary line of the State of Alabama, through Birmingham and Tuscaloosa, Ala., via Meridian, Miss., through to Mobile; and the Southern Railway between Jacksonville, Ala., and Selma, Ala.; all of which are land-grant aided lines between the limits given, the form of proposal hereto attached contemplates either delivery of the whole quantity at the mine, from which shipment will then be made on Government bill of lading to Mobile, Pascagoula, or Gulfport, as may be necessary, or delivery of about 7,000 tons at Mobile, Ala., about 5,000 tons at Pascagoula, Miss., and about 6,000 tons at Gulfport Miss.

Method of Delivery.—The United States will select the method of delivery which under the proposals received proves to be most economical and advantageous. If mine delivery is selected, the coal will be ordered in carload lots for shipment on Government bills of lading to be furnished by the contracting officer, but the contractor will be required to transfer it from cars to barges belonging to the United States and will therefore include in his price his cost for so transferring the coal at all three points of delivery, Mobile, Pascagoula, and Gulfport. Less than carload lots can not to advantage be ordered except for immediate delivery, and the prices for such smaller lots will contemplate delivery from the local stock of the contractor on barges or in bunkers at each locality as may be [fol. 21] specified. If prices based on delivery at Mobile, Pascagoula, and Gulfport prove to be more advantageous, then these prices will be accepted and order will be given for carload lots or less as may be required on board United States barges or in bunkers at Mobile, Ala.; Pascagoula, Miss.; and Gulfport, Miss.

Bidders will state the location of their mines, and the rail routes over which shipments may be made, including particularly the name of any branch line upon which the mines may be situated and the junction points at which such branches join main lines.

Bidders will describe the equipment and location of their delivery plants on the blank proposal attached hereto.

20. Measurement.—The quantity of coal delivered in carload lots will be certified railroad weights, checked, at the option of the con-

tracting officer or whenever necessary, by barge displacement or measurement in bulk. The measurements shall be made by a representative of the United States, subject to appeal to the contracting officer, whose decision shall be final. If measured in bulk, 38.3 cubic feet will be considered equivalent to one ton of 2,000 pounds.

28. Service Test.—At the option of the constructing officer, a practical service test of any coal or coals offered may be made, under the supervision of the contracting officer or his representative, in the furnaces in which the coal to be purchased is to be used; and the right is expressly reserved to reject any coal which on such test may prove unsuited to the particular furnace and boiler equipment, or which from practical service experience in the past is known to be unsuited to this equipment, regardless of its calculated cost per 1,000,000 British thermal units. The interested bidder or his authorized representative may be present at such test.

If required by the contracting officer, each bidder must deliver to the United States, at Mobile, Ala., within twenty (20) days after receiving notification, a sufficient quantity of the coal he proposes to furnish, to permit a service test to be made of its qualities as a steam coal. The quantity required for this purpose will not be less than forty (40) tons, and the bidder will be paid therefor at price stated in his proposal.

Sampling.—29. Taking of Samples Imperative.—As payment for bituminous (or semibituminous) coal is based upon the quality of coal delivered as shown by analyses of representative samples, it is imperative that samples representing every order of coal be taken and the proper officials of the Government will see that such samples are obtained.

30. Contractor may be Present.—If desired by the contractor, permission will be given to him or his representative to be present and witness the collection and preparation of the samples to be forwarded to the Government laboratories.

31. When Samples will be Taken.—The coal will be sampled at the time it is being loaded or unloaded from railroad cars, ships, barges, or wagons, or when discharged from contractor's supply bins.

39. Special Moisture Sample.—In the reduction of the gross sample to the sample for transmittal to the laboratory the gross sample will unavoidably lose moisture. To determine the moisture content in the coal delivered, a separate special moisture sample must be taken. This will be accumulated by placing in a hermetically [fol. 22] sealed receptacle small parts of the freshly taken increments of the gross sample.

40. Moisture Samples Discretionary.—The collection of sepcial moisture samples will be discretionary with the Government. Special moisture samples will be taken if, in the opinion of the Government inspector, the coal contains moisture in excess of the amount guaranteed by the contractor. The special moisture samples will be taken

so as to represent the coal with respect to the moisture contained at time of weighing.

41. Extending Deliveries.—If deliveries extend over any considerable period, what would otherwise be a gross sample may be worked down in successive stages to samples of a size suitable for transmittal to the laboratory, and the samples representing the several partial deliveries may be analyzed and the several analyses averaged, or the several samples may later be mixed at the delivery point or in the laboratory and reduced to one sample and one analysis made.

Analysis.—42. Method.—Immediately on receipt of a sample in the laboratory it will be analyzed and tested by the Government in accordance with the method recommended by the American Chemical Society and by the use of a bomb calorimeter.

Causes for Rejection.—45. Unsatisfactory Fuel.—Coal containing percentages of volatile matter or sulphur higher than the standards guaranteed (par. 24) or having a moisture content in excess of that guaranteed, or containing percentages of ash greater than indicated in the column "maximum limits for ash" in the table in the section entitled "Price and payment" (par. 47), or failing to give satisfactory results because of excessive clinkering or a prohibitive amount of smoke, or proving for any other cause to be undesirable fuel, will be subject to rejection, and the Government will have the right to cause the contractor to remove such coal at no cost to the Government. Such event may result in the Government purchasing in the open market, or through competitive bidding, a sufficient quantity of coal to supply the deficiency caused by such failure, or annulling the contract by giving notice in writing to that effect to the contractor, and the Government, in its discretion, purchasing such coal in the open market or by contract by competitive proposals; the contractor to remain liable for all damages sustained by the United States on account of such failure, including the difference, if any, between the cost of purchasing and delivering said coal and the price at which the contractor agreed to furnish it. The contract price must be understood to be the adjusted price per ton based upon analysis, as hereinafter described under the section entitled "Price and payment." If it shall be impracticable to cause the contractor to remove coal subject to rejection, the Government may use such rejectable coal, subject to deductions as determined under the section entitled "Price and payment," and may in addition, as circumstances warrant in the opinion of the contracting officer, make a further deduction of not to exceed twenty-five (25) per cent of the amount of the adjusted bill, based on the tonnage of the coal under question and the adjusted price per ton; and the decision of the contracting officer as to the percentage of the adjusted price to be deducted under this provision shall be final.

Price and payment.—46. Method of Payment.—As soon as practicable after the close of each month, if requested in writing by the [fol. 23] contractor, payment will be made in the amount of 60 per cent of the invoice price for all coal delivered under the con-

tract during that month. Upon the receipt of the official report of the analysis of the deliveries during the month the proper corrections to the invoice price will be determined, in accordance with the provisions of paragraphs 45 and 47, and the balance, if any, due the contractor for the month's deliveries, less the 10 per cent retained (par. 16), will be paid to the contractor with the next monthly payment. If the results of the analysis show a balance due the United States, such balance will be deducted from the next monthly payment, or may be recovered from the contractor and his surety under the bond. Upon the termination of the contract, all retained percentages, less any deductions required by the terms of the contract, will be paid to the contractor.

47. Determination of Price.—Payment will be made upon the basis of the price named in the proposal, corrected as follows for variations in heating value, ash, and moisture from the standards specified in the contract (see par. 45 for an additional deduction on coal subject to rejection): * * *

The price will be further corrected for moisture content in excess of the amount guaranteed by the contractor, the deduction being determined by multiplying the price bid by the percentage of moisture in excess of the amount guaranteed.

49. Final Decision.—On all questions arising under these specifications the decision of the contracting officer shall be final.

Form 19

These articles of agreement entered into this 15th day of March, nineteen hundred and fifteen, between Lieut. Col. C. Keller, Corps of Engineers, United States Army, hereinafter designated as the contracting officer, representing the United States of America, of the first part, and Gulf States Coal Company, of Mobile, in the county of Mobile, State of Alabama, hereinafter designated as the contractor, of the second part, witnesseth, that the said parties do hereby covenant and agree, to and with each other, as follows:

Article 1. In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish and have delivered on United States barges, or in bunkers, from hoists, in carload lots, at Mobile, Alabama, when requested, eighteen thousand (18,000) short tons, more or less, of Imperial washed pea coal, mined by the Imperial Coal & Coke Company at their Dixiana mines, at one dollar and thirty-eight cents ($1.38) per short ton. Coal to be shipped on Government bill of lading, to be furnished by the contracting officer, the United States to pay railroad freight charges between Dixiana and Mobile and the contractor to provide for transferring the coal from cars to United States barges and to pay all demurrage charges that may accrue.

For the same brand of coal in less than carload lots, delivered on United States boats or barges, at Mobile, Alabama, a price of $2.73 per short ton will be paid, the contractor to pay all freight and other charges.

[fol. 24] The option is, however, reserved to the United States to call upon the contractor to tow, at his own expense, from Mobile to Pascagoula and to Gulfport, Mississippi, coal upon which the United States has paid the freight charges between Dixiana and Mobile, Alabama, and which the contractor has, at his own expense, transferred from cars to United States barges. Whenever this option is exercised, the United States will pay for coal thus delivered at Pascagoula $1.76 per short ton, and for coal thus delivered at Gulfport $1.98 per short ton.

The said contractor shall also furnish and deliver, for steaming and drinking purposes, nine million (9,000,000) gallons, more or less, of fresh water, as follows:

At Mobile, Ala., 3,500,000 gallons, and at Pascagoula, Miss., 2,500,000 gallons at eight (8) cents per 1,000 gallons; and at Biloxi, Miss., for use at Gulport, Miss., 3,000,000 gallons at ten (10) cents per 1,000 gallons.

The party of the first part will pay for coal delivered in accordance with the provisions of paragraphs 46, 47, and 48 of the specifications, on the basis of the following analysis: Moisture in "delivered coal," in "dry coal," 4%; sulphur in "dry coal," 1%; British thermal "dry coal," 14,800; volatile matter in "dry coal," 30%; and delivered, the prices stated in the preceding paragraph.

ARTICLE 2. All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as do not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and quantity shall be final.

ARTICLE 9. Until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

In witness whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written, articles 16, 17, & 18, having been canceled with our knowledge and consent, such elimination being hereby agreed to.

Witnesses: J. A. Marques (as to) C. Keller, Lieut. Col., Corps of Engineers. Witness: J. O. Acree (as to) Gulf States Coal Co., by D. T. Buell, President.

(Executed in Triplicate.)

Approved: March 30, 1915. Dan C. Kingman, Chief of Engineers, U. S. Army.

[fol. 25] APPENDIX B

Advertisement

U. S. Engineer Office, Mobile, Ala.—Sealed proposals for furnishing about twelve thousand (12,000) tons of bituminous coal will be

received at this office until 11 a. m. July 31, 1916, and then opened. Information on application.

16. Payments.—Payments will be made monthly for coal delivered and accepted, in accordance with paragraphs 46 and 47 of these specifications. A percentage of ten (10) percentum will be reserved from each payment until completion of the contract.

19. (a) Place of Delivery.—With a view to permitting the United States to take advantage of the reduced freight rates which apply to shipments of Government property over the main lines of the Louisville and Nashville Railroad Company between Decatur and Flomaton, Ala.; the Alabama Great Southern and Mobile and Ohio Railroad practically from the north boundary line of the State of Alabama, through Birmingham and Tuscaloosa, Ala., via Meridian, Miss., through to Mobile; and the Southern Railway between Jacksonville, Ala., and Selma, Ala.; all of which are land-grant aided lines between the limits given, one option in the form of proposal hereto attached contemplates delivery of the whole quantity at the mine, from which shipment will then be made on Government bill of lading to Mobile. In case coal is transported by water from the mine to Mobile, delivery will be made on board U. S. barges in Mobile River.

(c) Method of Delivery.—Coal may be transported by water or by rail from the mines to Mobile, Ala. In order to compare bids, the land-grant freight rate from mine to Mobile will be added to the price bid for mine delivery. Bidders will state the location of their mines, and the rail routes over which shipments may be made, including particularly the name of any branch line upon which the mines may be situated and the junction points at which such branches join main lines. Bidders will describe the equipment and location of their delivery plants on the blank proposal attached hereto.

20. Measurement.—The quantity of coal delivered in carload lots will be that ascertained from corresponding certified railroad weights. If shipped by water, displacement measurements will be used, the unit weight of water used in the computation being obtained from a sample of water taken at the time of measurement.

28. Service Test.—At the option of the contracting officer, a practical service test of any coal or coals offered may be made, under the supervision of the contracting officer or his representive, in the furnaces in which the coal to be purchased is to be used; and the right is expressly reserved to reject any coal which on such test may prove unsuited to the particular furnace and boiler equipment, or which from practical service experience in the past is known to be unsuited to this equipment, regardles of its calculated cost per [fol. 26] 1,000,000 British thermal units. The interested bidder or his authorized representative may be present at such test.

If required by the contracting officer, each bidder much deliver to the United States, at Mobile, Ala., within twenty (20) days after receiving notification, a sufficient quantity of the coal he proposes to furnish, to permit a service test to be made of its qualities as a steam coal. The quantity required for this purpose will not be less

than forty (40) tons, and the bidder will be paid therefor at prices stated in his proposal.

Sampling. 29. Time of Sampling.—The coal shall be sampled when it is being loaded into or unloaded from railroad cars, ships, barges, or wagons, or when discharged from supply bins, or from industrial railway cars, or grab buckets, or from the coal-conveying equipment at the power plant, as the case may be and as may be mutually agreed upon.

38. Special Moisture Sample.—In the reduction of the gross sample to the sample for transmittal to the laboratory, the gross sample may unavoidably lose moisture. To determine the moisture content in the coal delivered a separate special moisture sample may be taken.

40. Moisture Samples Discretionary.—The collection of special moisture samples shall be discretionary with the Government. If special moisture samples are not taken, the moisture determined for the gross sample shall govern.

Causes for Rejection

* * * * * * *

Price and Payment.—46. Method of Payment.—As soon as practicable after the close of each month, if requested in writing by the contractor, payment will be made in the amount of 60 per cent of the invoice price for all coal delivered under the contract during that month. Upon the receipt of the official report of the analysis of the deliveries during the month the proper corrections to the invoice price will be determined, in accordance with the provisions of paragraphs 45 and 47, and the balance, if any, due the contractor for the month's deliveries, less the 10 per cent retained (par. 16), will be paid to the contractor with the next monthly payment. If the results of the analysis show a balance due the United States, such balance will be deducted from the next monthly payment, or may be recovered from the contractor and his surety under the bond. Upon the termination of the contract, all retained percentages, less any deductions required by the terms of the contract, will be paid to the contractor.

47. Determination of Price.—Payment will be made upon the basis of the price named in the proposal, corrected as follows for variations in heating value, ash, and moisture from the standards specified in the contract (see par. 45 for an additional deduction on coal subject to rejection):

The price will be further corrected for moisture content in excess of the amount guaranteed by the contractor, the deduction being determined by multiplying the price bid by the percentage of moisture in excess of the amount guaranteed.

49. Final Decision.—On all questions arising under these specifications the decision of the contracting officer shall be final.

[fol. 27] These articles of agreement entered into this 21st day of August, nineteen hundred and sixteen, between Major Edward H. Schulz, Corps of Engineers, United States Army, hereinafter designated as the contracting officer, representing the United States of

America, of the first part, and Imperial Coal and Coke Company, of Birmingham, in the county of Jefferson, State of Alabama, hereinafter designated as the contractor, of the second part, witnesseth, that the said parties do hereby covenant and agree, to and with each other, as follows:

Article 1. In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish and deliver on railroad cars at its mines at Dixiana, Ala., approximately twelve thousand (12,000) short tons of Imperial washed pea coal, at one dollar and fifty cents ($1.50) per ton of 2,000 pounds.

The party of the first part will pay for coal delivered, as above stated, in accordance with the provisions of paragraphs 46, 47, and 48 of the specifications, on the basis of the following analysis:

Moisture in "delivered coal"	3%
Ash in "dry coal"	4%
Sulphur in "dry coal"	1%
Volatile matter in "dry coal"	32%
British thermal units per pound of "dry coal"	14,800

As provided in paragraph 22 of the specification, about 5% of the total amount to be furnished under this contract must be Imperial washed nut coal, the price to be one dollar and fifty cents ($1.50) per ton of 2,000 pounds on the basis of the above analysis for Imperial washed pea coal.

Article 2. All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector appointed on the part of the United States and such as do not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and quantity shall be final.

Article 9. Until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

In witness whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written, article 16 and 17 having been canceled with our knowledge and consent, such elimination being hereby agreed to.

Witnesses: W. A. Carney (as to) Edward H. Schulz, Major, Corps of Engineers, U. S. A. Imperial Coal & Coke Company, by H. Hammond, Treasurer. Witness: as to Imperial Coal & Coke Co., M. L. Ford, P. H. Neal.

Approved September 13, 1916. W. M. Black, Chief of Engineers, U. S. Army.

[fol. 28]

APPENDIX C

U. S. Engineer Office, Montgomery, Ala.

Sealed proposals in duplicate to supply all the articles mentioned below will be received until 12 m., August 30, 1917, when they will

be publicly opened. The envelope must be marked "Proposal for coal."

Bidders will insert the prices at which they will furnish and deliver the following stores f. o. b. at Pensacola, Fla., including cost of package and cost and risk of transportation.

Each article must be good and merchantable in kind, quality, and condition, subject to inspection before acceptance, which will be determined only on receipt of the United States agent, to whom the articles are consigned. No payment or responsibility for rejected articles. The right is reserved to reject any or all bids, or to accept the lowest bid for the article which in the opinion of the district officer is the best and most suitable for the purpose intended.

The right is reserved to increase or diminish the quantities 20 per cent.

Notice will be given only when an offer is accepted.

This proposal must be made out in full, signed and returned to this office.

C. L. Sturdevant, Captain, Corps of Engineers, U. S. A.

Note.—Prices to be f. o. b. at your mines, shipments to be made on Govt. B/Ls to be furnished by this office.

U. S. Engineer Office, Montgomery, Ala., Nov. 2, 1914.

Tennessee Coal, Iron & Railroad Company, B'ham, Ala.

In accordance with your proposition, as per sealed proposal opened 10-27-1914, please deliver the following articles on Govt. B/L, furnished by this office:

About 2,000 tons, 2,240# each, more or less, as needed, Old Pratt screened coal, per ton of 2,240#.....$1.80 per ton.

Coal to be shipped in lots of one or more cars each, and traced until they reach destination.

Coal must be free from dirt, slate, &c., & must be clean.

R. R. weight to govern, and payments will be made monthly for such coal as has been delivered and accepted.

Coal not up to analyses will be rejected.

Coal must be shipped without delay after receipt of Govt. B/L, via routes shown thereon.

For Earl I. Brown, Major Corps of Engineers, U. S. A., by G. C. Scherer, Chief Clerk.

[fol. 29] War Department, United States Engineer Office, Montgomery, Ala., May 24, 1917.

Cary & Company, Pensacola, Fla.

SIR: Referring to your bid for coal opened in this office on May 23, 1917, I am enclosing herewith order for one car of coal of approximately 40 tons, to be shipped to Pensacola, Fla., consigned to J. E. Turtle, asst. engr. Government bill of lading is inclosed herewith to cover this shipment.

This car is ordered under the terms of the specifications and is

to be used as a sample to determine the fitness of your coal. Of course, you will be paid the price bid f. o. b. mines, namely, $4.50.

Very respectfully,

C. L. Sturdevant, Captain, Corps of Engineers.

Cary & Co. (Incorporated), Pensacola, Fla., May 25th, 1917.

Capt. C. L. Sturdevant, Corps of Engineers, Montgomery, Ala.

SIR: We are in receipt of your communication of the 24th inst., and as advised we have requested the mines to ship one car of coal, approximately 40 tons, to Capt. J. E. Turtle, U. S. assist. engineer, on Government bill lading.

The price of $4.50 per ton at the mines is in order.

Respectfully,

Cary & Company, by R. M. Cary, President.

A true copy:

W. A. Johnson, Major Corps of Engineers, U. S. A.

U. S. Engineer Office, Montgomery, Ala., October 20th, 1915.

Tennessee Coal, Iron & R. R. Co., Birmingham, Ala.:

In accordance with your proposition, as per sealed proposal opened May 28, 1915, please deliver the following articles, f. o. b. your mines (Edgewater, B'ham. Dist., Ala.):

5,000 tons of 2,240# each, R/M steam coal, more or less.

To be shipped in lots of one or more cars each.

To be shipped on U. S. Govt. B/L. furnished by this office.

Shipments to be traced until they reach destination.

Probable points of shipment:

Pensacola, Fla.	Columbus, Ga.
Panama City, Fla.	Rome, Ga.
Apalachicola, Fla.	Montgomery, Ala.
Bainbridge, Ga.	Mobile, Ala.
Selma, Ala.	Riverside, Ala.

And to other such points as is desired.

Coal must be clean, free from dirt, slate, etc.

[fol. 30] R. R. weights govern and payments will be made monthly for such coal as has been delivered and accepted.

Coal not up to analysis will be rejected.

Coal to be furnished: "Old Pratt" screened steam coal, at $1.75 per ton of 2,240#.

Coal must be shipped without delay after receipt of Govt. B/L. via routes as shown thereon.

Guaranteed analysis:

Volatile	29.91%	Fixer carbon	61.61%
Ash	5.45%	Sulphur	1.33%
B. T. U.'s (dry coal)	14,750		

Moisture in delivered coal 2% and less.

All coal screened over 2" circular perforated screens and hand picked.

Earl I. Brown, Major Corps of Engineers, U. S. A., by G. C. Scherer, Chief Clerk.

A true copy:
W. A. Johnson, Major, Corps of Engineers, U. S. A.

[fol. 31]

Appendix D

Proposal for Supplies Afloat

U. S. S. Tonopah.
Naval Station, Pensacola, Fla., April 8, 1915.

Zimmern Coal Co., Pensacola, Fla.:

Please return this proposal, duly signed, by 10 o'clock a. m., April 10, 1915, with prices entered opposite each item named below, for delivery on board this vessel April 20, 1915, free of charge, as specified below within —— days from receipt of order, and subject to all conditions appearing on the face and back of this form.

If not prepared to submit a bid, please so state and return this proposal.

Respectfully, H. G. Bowerfind, Assistant Paymaster, U. S. Navy.

Articles required	Price of each item	Per—(State unit of quantity bid on)		Total amount of each item
250 tons coal (more or less); to be dry, of best quality, and practically free from slate, dirt, sulphur, and other impurities, and subject to usual inspection and test, and weigh 2,240 lbs. to ton.				
To be delivered alongside U. S. S. Tonopah in flat seagoing lighters at Naval Station, Pensacola, Fla.				
To show the name of mine from which furnished. Weight to be determined by a representative of the ship who will furnish a certificate to the dealer or contractor and to the commanding officer of the U. S. S. Tonopah. To be weighed in lighters and the ship's representative will see that his record agrees with that of the contractor as to total tons of 2,240 lbs. before coal is delivered alongside ship.				
Certified analysis of the coal bid on must accompany bid. When possible the analysis should be a Government report.				
Black Creek screened lump coal from The Imperial Coal & Coke Company's mines at Dixiana, Alabama.....	$3.59	Ton	2,240	$897.50
If Government bills of lading are furnished —deduct 1.23¢ per ton or.....	2.36	"		
Bidders should state shortest time in which delivery can made made.				
Aggregate amount of proposal.....	.....	.....		$897.50

This must be filled and signed by bidder without alternations.

Accepted @ $2.36 per ton of 2,240 lbs. Gov't B/L furnished.
H. G. Bowerfind, Ass't Paym. U. S. N.

The undersigned hereby agrees to furnish within five days, and in conformity with this proposal, the above-named articles at the prices quoted above. In event of failure to make satisfactory delivery within the time specified, it is hereby agreed that the order may be cancelled [fol. 32] without notice, at the option of the purchasing officer.

Zimmern's Coal Company, by John R. Vidmer, Manager, 405 Am. National Bank Bldg.

(Signature. If a corporation, its name and signature of an officer is required.)

NOTICE.—The Paymaster General directs that invitations to bid on supplies required shall not be sent to persons so long as they are in arrears in the satisfactory delivery of supplies already ordered, and that this notice shall appear upon all invitations to bid and orders for supplies.

[fol. 33] VI. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the First day of May, A. D., 1922, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order, adjudge and decree that the plaintiff herein is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed; And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, The Louisville and Nashville Railroad Company, as aforesaid, the sum of Ninety-six Dollars and sixty-seven cents ($96.67), the cost of printing the record in this court, to be collected by the Clerk as provided by law.

By the Court.

VII. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On June 5, 1922, the plaintiff filed a motion to set aside judgment and to amend findings of fact. Said motion was overruled by the Court on June 12, 1922.

On June 23, 1922, the plaintiff presented a motion for leave to file second motion to set aside judgment. On June 26, 1922, said motion, for leave to file a second motion, was allowed by the Court.

On June 27, 1922, the plaintiff filed a second motion to set aside judgment and to amend findings of fact. Said motion was overruled by the Court on December 4, 1922.

[fol. 34] VIII. Plaintiff's Application for Appeal—Filed January 29, 1923

Claimant shows to the court that this case involves more than thirteen thousand dollars ($13,000.00); that on May 1, 1922, the court filed findings of fact and rendered a judgment dismissing the petition; that on June 5, 1922, claimant filed a motion to amend said findings of fact and set aside said judgment, and on December 4, 1922, the court made an order overruling said motion. Claimant hereby prays an appeal to the United States Supreme Court from said judgment and order.

Benjamin Carter, Attorney for Claimant.

IX. Order of Court Allowing Appeal—Filed February 5, 1923

On consideration of the plaintiff's application for appeal in this cause it is ordered by the court that an appeal be and the same is allowed from the final judgment of the court in this cause.

[fol. 35] In Court of Claims

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, memorandum filed by the court and appendices A, B, C, D, thereto; of the judgment of the Court; of the plaintiff's application for appeal and of the order of the Court allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Eighth day of February, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 29,460. Court of Claims. Term No. 29. The Louisville and Nashville Railroad Company, appellant, vs. The United States. Filed March 19th, 1923. File No. 29,460.

INDEX.

PAGE

Statement 1

Assignment of Errors 8

Argument . . . . . .

Coals produced at inland mines being bought by the United States, and being, under the contract, loaded at railroad termini by the sellers onto barges of the United States and carried on those barges, at the expense of the sellers, to the points of final destination, were not a subject for land-grant deductions from the railroad rates fixed by the tariffs for the transportation to the seaboard 10

Coals produced at inland mines being bought by the United States, and being, under the contract, loaded at railroad termini by the sellers onto barges of the United States, and the sellers being responsible for the safety of the property until after inspection and acceptance and said reloading, were not subjects for land-grant deductions from the railroad rates fixed by the tariffs for the transportation to the seaboard 10

The United States, upon shipments of coal to seaboard, is not exempt from conditions, made in special tariffs, for the use of switching tracks and a plant for loading the contents of cars onto ships 11

The United States, upon shipments of coal to seaboard, is not exempt from conditions, made in special tariffs, for the use of switching tracks and a plant, not owned or operated by the railroad company, which had transported the coals 16

Shipment of coals to seaports and reshipment therefrom to other coast points or to river points is not export 12

CASES CITED.

Illinois Central Railroad Co. *v.* United States, 265 U. S. 209 9
United States *v.* Union Pacific R. R. Co., 249 U. S. 354 12
Louisville & Nashville R. R. Co. *v.* United States, 258 U. S. 374 12
Missouri Pacific R. R. Co. *v.* United States, 56 Ct. Cls. 341 12
Interstate Commerce Comm. *v.* Stickney, 215 U. S. 98 13
Manufacturers Railway Co. *v.* United States, 246 U. S. 457 14
Southern Railway Co. *v.* St. Louis Hay & Grain Co., 214 U. S. 297 15

Supreme Court of the United States.

October Term, 1924.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY
v.
THE UNITED STATES.
No. 29.

BRIEF FOR APPELLANT.

This case, being an appeal from the Court of Claims, presents two distinct claims of appellant for compensation with respect to the use (1) of a land-aided line of railroad and (2) of switch tracks, hoists and chutes, at Mobile, Alabama, and Pensacola, Florida, not connecting with the particular track which received such aid. One question presented is the applicability of land-grant rates, viz: fifty percent of those fixed by the commercial tariffs, to transportation over the land-aided track of commodities of which, as appellant contends, the Government was not the owner. On this general question, though on facts radically different from those which occur in this case, the court in a case of the *Illinois Central Railroad Company* v. *The United States*, 265 U. S. 209, rendered a decision in the Government's favor. The other question, which has not previously been before this court, is whether, out of rates fixed by special tariffs for switching or "spotting" of cars and hoisting of coal and chuting it onto ships, the Government should have deductions of fifty per-cent because of the land-aid to the disassociated track.

The latter of these questions turns on certain peculiar provisions of the tariffs referred to. For determination of those points, the railroad geography of that region must be understood.

The main line of the Louisville & Nashville railroad, from Cincinnati to New Orleans, is land-aided in the State of Alabama between Decatur, on the Tennessee River, and Flomaton, near the Florida boundary as is another of its lines extending from Flomaton, through Pensacola, to River Junction, Florida. No aid was received by the main line between Flomaton and New Orleans. Flomaton is sixty miles from Mobile and forty-four miles from Pensacola. This main line penetrates or skirts extensive coal fields, lying mainly in what is known as the "Birmingham district." A few of the coal mines are on this Louisville & Nashville main line, but the majority of them are on branch lines of this company or on lines of other companies. Some coals going to Mobile or Pensacola by this Louisville & Nashville main line, whether mined on its own side lines or on the lines of other carriers, reach that line at Birmingham, Warrior, New Castle, Boyles, Helena, Calera and some other stations. In some cases, where the distance from the mines to Birmingham is short, the freight rates are equalized between the shipping points and Birmingham. In other cases, because of greater distances or for other reasons, the rates from the mines are greater than from Birmingham.

The tariff immediately concerned was issued in January, 1915, an evolution from one issued in December, 1911. The special aim of these tariffs was to promote sales of coals for export, and so it was provided that wherever the Louisville & Nashville Company received from the haul, proper, of such coal, for that purpose, as much as one dollar a ton, it would

itself bear the spotting and hoisting charges. The company owned and operated spotting and hoisting plants at Pensacola, but at Mobile they were operated by a separate corporation. All were built entirely without land-aid.

Said tariff of January 30, 1912, was entitled "I. & N. R. R. Tariff, G. F. O. No. 1791; I. C. C. No. A–12137," and there were supplements thereto numbered 42, 44, 45, 46, 47, 49, 50 and 51, becoming effective at various dates in 1915. Among the "rules and regulations" of said tariff was the following:

> In the absence of specific provision to the contrary, shipments transported under this tariff will be subject to all terminal charges and all allowances, such as: Arbitraries, Car Rentals, Car Service, Demurrage, Diversion, Drayage, Handling, Inspection, Mileage on Private Cars, Overloaded Cars, Handling of, Reconsignment, Switching, Transit Privileges, Wharfage; together with all other privileges, charges, and rules which in any way increase or decrease the amount to be paid on any shipment between points named in the tariff, or as the same may be amended, or which increase or decrease the value of the service to the shipper, as provided in tariffs published and lawfully on file with the Interstate Commerce Commission.

Said supplement No. 42 and each of said later supplements contains, after its statement of rates, a note of the following text:

> (*c*) On coal paying the Louisville & Nashville R. R. to Mobile, Ala., and Pensacola, Fla., a road haul revenue of $1.00 per ton of 2,000 lbs. or more, the cost of transferring the coal from cars onto barges or into vessels through the hoist of the Mobile Coal Co. (Mobile, Ala.), and L. & N. R. R. Co. (Pensacola, Fla.), will be assumed by the Louisville & Nashville R. R. Co.

(*d*) On coal paying the Louisville & Nashville R. R. to Mobile, Ala., and Pensacola, Fla., a road haul revenue of less than $1.00 per ton of 2,000 pounds, the cost of transferring coal from cars onto barges or into vessels will be ten cents per ton of 2,000 lbs., plus $2.00 per car switching, or spotting charge in addition to the freight rate, subject, however, to a maximum total charge of $1.00 per ton of 2,000 lbs., including transportation and hoisting and switching (or spotting) service.

Said tariff and supplements contained other special provisions, with respect to spotting and hoisting charges and other matters, applying to shipments originating on other railroad lines than appellant's and from which therefore appellant did not receive the entire earnings.

Said tariff and said supplements thereto were all filed with and approved by the Interstate Commerce Commission.

Except in one instance, the coals with which this case is concerned were for use of the Corps of Engineers of the Government in river and harbor improvements at or near Mobile or Pensacola or at or near to Pascagoula and Gulfport, in Mississippi, or Fort Morgan, in Alabama, to which other Mississippi or Alabama points the transportation from Mobile was by Government barges. All of the coals were handled by the spotting and hoisting appliances above described.

The rates applicable by said tariff and its supplements between said points of Mobile and Pensacola ranged from $1.00 to $1.15 per ton on coals to be exported or to be reshipped for commercial uses to Texas or Florida points, and $1.10 to $1.25 per ton on coals for other uses. After making land-grant deductions with respect to appellant's track between Decatur and Flomaton or parts of the same, the net compensa-

tion accruing to appellant for the road haul to Mobile or Pensacola ranged from 55 cents to 69.3 cents per ton.

Appellant's bills for this transportation were paid through the Auditor for the War Department. They included charges of 10 cents per ton for spotting and hoisting of the coals. In making his settlements and payments, the Auditor, taking as bases the land-grant rates, deducted the amounts of these terminal charges. Appellant protested and appealed to the Comptroller of the Treasury, but to no avail.

Another question, suggested by this case, relates to the effect, in contracts by which the Government obtained coal or other supplies, to be accepted or rejected at points of destination, of stipulations fixing the purchase prices as payable at points of shipment; appellant's contention being that, until actual acceptance by the Government at destinations, the title to the properties remained in the shippers, and therefore that full tariff rates, instead of fifty percent rates which had been paid by the Government's disbursing officers, were due for the transportation. An adverse decision was made by the Court of Claims on this proposition in a case of the Illinois Central Railroad Company which has been affirmed by this court (265 U. S. 209). If the facts of the two cases were substantially identical, it could not be denied that the instant case is ruled by that decision; but, actually, in some of the transactions here involved, there are variations, deemed by appellant to be materially different from anything contained in the Illinois Central case. Chief among these new points are (1) that the price of some coals was made for delivery at destination, Mobile, (2) that in some of the other instances coals were bought by the Government from dealers at Pensacola; and (3) that on carload purchases the shippers

were not only responsible for the expedition and safety in shipment, but at their own expense were to transfer coals at the railroad wharves into barges belonging to the Government and, at the option of the Government's engineers, were to tow these loaded barges at their expense to places where the coals were to be used, which, in the one case, was to be covered by the prices named for the coal and, in the other case, at proportionately higher prices, also named, for the entire service.

On all of the transactions here in suit, as in those of the Illinois Central case, the sale contracts stipulated for tests of various kinds at and beyond destinations as conditions to acceptance of and payment for the materials.

Clearly cases in which sellers contracted to deliver property, at destinations far away, and receive their pay there, are not ruled by cases in which the prices applied at points of shipment.

The origin of this case, as well as of the two other cases here referred to, was an attempt by Government officers to evade former rulings of the Comptroller of the Treasury which forbade the application of land-grant rates to any property which did not truly belong to the Government. Firstly, there were presented to the Comptroller of the Treasury, commencing in 1914, cases in which private contractors, who were to construct Government improvements, had shipped their materials over a land-aided road, the Government having no interest in them whatever, but having agreed with them that it would pay the freight charges and thereby obtain for them land-grant deductions. Full rates being denied to the carriers by the Government accounting officers and appeals being taken to the Comptroller, he held that the imposition so practiced on the carriers was unlawful; that the controlling

question was whether the Government owned the properties or not, and that, since it did not, it was immaterial who, by arrangements to which the carrier was not a party, paid for the transportation.

Variants of the practice thus condemned by the Comptroller were attempted by Government engineers or accountants but without success. The Comptroller held each time that the actual ownership of the property transported was the one consideration to determine whether land-grant rates or full rates should be paid.

At 20 Comptroller's Decisions 721, the Comptroller decided (1) that whether the Government should purchase properties at the initial or terminal point of shipment was purely an administrative question—the factor favoring purchase at the initial point being the applicability of land-grant rates, and the factor favoring purchase at the terminal point being escape from all the labor, expense and risk of the transportation—and (2) that the use of a Government bill of lading did not in any way change the relations of the consignor or the consignee to the carrier. Finally, in some instances, Government engineers hit upon the device of stipulating that, for any property accepted by them at destinations, the price should apply as of the points of shipment.

Since the instant case, unlike that of the Illinois Central Railroad Company, presents no transaction more than two years old when the petition was filed, no question of limitation applies. Possibly, however, there is some importance in the fact that at the times of the shipments appellant had no knowledge of any arrangements by the Government and the shippers which might tend to vest title in the Government during the transit. The court has found (Finding XV,

Rec. p. 12), that there is no evidence in the record as to appellant's knowledge of the terms of the contracts or orders or of anything, beyond the bills of lading, by which it may have been misled. The burden being on the Government to make positive proof, if there were any, it is to be assumed that nothing of the kind occurred.

Assignment of Errors.

Appellant says the court erred:

1. In holding that materials transported, with respect to which other services, included in the prices named, were to be performed by the shippers after reaching destinations on railroad lines, and which the United States had the option to accept or reject, after they had reached those destinations, were the property of the United States while in transit on railroad lines.

2. In holding that land-grant rates were applicable to railroad haul of materials when such haul was merely a part of services required of shippers by contract and the shippers were responsible for safe and prompt performance of the entire transportation and the materials were not to be accepted by the United States until after inspection at or beyond such railroad destinations.

3. In holding that the United States, by reason of a land-aid to a part of a railroad line, was, upon the use made of switching and hoisting appliances, at other points on said line, not land-aided, entitled to be exempted from a provision in a tariff by which liability of the shippers for switching and hoisting charges turns on the rates payable for the transportation.

4. In holding that, for services performed by switching and hoisting appliances not constructed, and which were not reached by railroad track constructed by aid

of public lands, the United States was entitled to a diminution of charges because of land-aid received by another part of said line.

5. In dismissing the petition.

Argument.

The question at large of the title to freights shipped under contracts by which the purchase prices were to apply f. o. b. points of shipment—inspection and acceptance at destinations being stipulated as conditions precedent to the Government's acceptance of the properties—has been decided by this court, adversely to the carrier, in the case of the Illinois Central Railroad Company, 248 October Term, 1923; but the details of fact by which to dertermine the exact point at which title passed from the shippers to the Government are not the same, nor alike, in the instant case and in that case. To an extent it would seem proper that the court, in considering this case, consult the brief of appellant in the other case, for on some points there presented, with authorities, the court did not touch in its opinion and it seems fair to assume no account was taken of them. If this latter be true, the court possibly will be disposed to hear, at the oral argument, a reference, at least, to those points and the cases on which they were rested.

265 U. S.

With respect to some purchasers of coal, the instant case is scarcely akin to anything contained in the Illinois Central case. In these instances, there was no pretense that title passed at the points of shipment. The prices applied at the stipulated point of delivery Mobile (Record, pp. 2, 3, 17, 18).

It is true the Government undertook to pay the freight charges; but there is nothing exceptional in writing into a contract a condition which would attach

without any such specification, to-wit: that the transportation charges were to fall on the consignee. What those transportation charges, or the basis for them, should be, was not specified between these sellers and the Government; and, obviously, the rights of the carrier would not be affected by any stipulations or communications between them.

In the other exceptional transactions of this case (Record pp. 3, 4, 21, 22) the coal was actually purchased by the Government from local dealers at Pensacola, who handled coals of the Tennessee Coal, Iron and Railroad Company and other miners; and, these dealers not having the specified supplies on hand at Pensacola, either they or the Government's engineer in charge communicated with the officers of that company at Birmingham, gave directions for shipments and stated that the coals would be subject to inspection and to rejection for unsatisfactory qualities.

An item of evidence regarding these particular shipments is the advertisement under which offers were received (Rec. p. 22). This stipulates for delivery f. o. b. at Pensacola.

The most remarkable feature of these sales, as stated in the same advertisement, is that the freight charges or other expense of delivery were to be borne by the sellers.

Notwithstanding all this, the Treasury officers subjected these shipments, like the others, to land-grant abatements when they came to pay the sellers for the coal.

In the remaining contracts here concerned dominion over the property did not pass out of the shippers until after the railroad haul had ended. In some instances the shippers retained control of the coals and conducted at their own expense and risk the unloading into Government barges. In other instances, after such re-

loading, the shippers towed the barges to the sites of the work, ten, fifteen or twenty miles away, and for this service received additional named compensation. If the coals did not pass into the Government's hands until after an additional haul, or until after loading into the Government receptacles, how can it be said that the title was in the Government during the railroad haul, terminating at the wharves in Mobile or Pensacola.

To these questions, which did not arise in the Illinois Central case, apt answers are afforded by some of the cases cited for the appellant in that case.

The free-service provisions of the special tariff do not apply.

There are two reasons why the shipments here in question were not subjects for the special advantages provided in appellant's coal tariff and its supplements:

(1) The purpose of these concessions was to promote the sale of Alabama coal, through Mobile or Pensacola, in foreign markets and, by coastwise navigation, in certain domestic markets. Here were large, practically unlimited fields for trade expansion and therefore for increase of transportation on appellant's tracks. This was essentially a different thing from supplying coal for the Government's uses whether in improving rivers and harbors or in navigating ships. The demand of these latter services was limited and scarcely would have tempted a railroad company to set up a special tariff which yielded it little or no profit. But, however this may have been, these coals were not within the purview of the tariff actually made; they were not to be sold—were not intended for trade purposes—for the Government was not in the business of selling coal, and it had no competition in its own business of improving rivers and harbors; that, by whomsoever performed, being absolutely under Government control.

All of these coals were brought to Mobile or Pensacola for "bunkerage [on ships] and purposes other than export." The main purposes served were engineering work along the Mississippi Sound or in Mobile River. None of the coals here concerned were "exported from Alabama and sold in foreign markets or * * * shipped to and sold in Texas or Florida markets, * * * and competed with coals mined and shipped from other regions."

To make the word "exported" doubly clear, there was added in the tariffs "and sold in foreign markets."

This court, being called on in a number of cases to distinguish the public business and public employees from other passengers in order to define the applicability of land-grant rates, has held that (1) rejected applicants for enlistment in the army, (2) retired enlisted men, on furlough, returning to their stations, (3) retired enlisted men, en route to their homes after retirement from the army, (4) discharged military prisoners and (5) members of the coast guard, while serving the Treasury Department, are not troops of the United States, and that full rates must be paid for their transportation (*United States* v. *Union Pacific R. R. Co.*, 249 U. S. 354; *Louisville & Nashville R. R. Co.* v. *United States*, 258 U. S. 374).

In a number of cases, including that of the *Missouri Pacific Railroad Company*, No. 34581, the Court of Claims held that, because for theatrical and sporting parties, on the one hand, and United States troops, on the other hand, railroad service is not performed "under substantially similar conditions and circumstances." In the case named, the court said:

> "There is no competition between the Government and theatrical companies. They are not in the same class. They are not similarly circum-

stanced. There are various reasons of business policy which could be adduced for granting this rate to theatrical companies that would not apply to the Government. The Government in the transportation of soldiers does not, financially or in any other way, come into competition with any of the parties given special rates under this tariff, and consequently there can be no unjust discrimination and no cause for complaint.

* * * * * *

These party-rate tickets secure patronage which yields large revenue to the railroads. The withdrawal of these tickets would destroy that patronage. These and other considerations must be taken into account in determining whether there has been 'like and contemporaneous service' rendered 'under substantially similar circumstances and conditions.' The traffic provided for in the company's schedules has no analogy or resemblance to that carried on by the Government."

The Comptroller of the Treasury, in January, 1901, decided, in effect, that land-grant rates did not apply to railroad bridges crossing streams, and, citing and approving that ruling, he held that full rates should be paid for transfers connecting the tracks of land-aided lines. (8 Comptroller's Decisions, 334. Ib. 493.)

There is no apparent reason why "transportation" and the distinctions between this service and special services at terminals or elsewhere, should not be the same in relation to land-grant rates as to facilities and rates in commercial traffic. What these latter are may well be indicated by a few citations.

There were before this court in a number of cases a question which reached its final determination in *Manufacturers Railway Co.* v. *United States*, 246 U. S. 457, relating to free service between separate terminals,

or between terminals and a brewing company which was largely interested in the terminal company, to the constituent lines of that organization and denied to other lines which were not members. The effect of this decision, which justified this discrimination, turned on the proper classification of this free service. Speaking specially of the service to the brewery, the court said:

> "It is not any and every discrimination, preference, and prejudice that are denounced by the Commerce Act. Section 3 (Act of February 4, 1887, c. 104, 24 Stat. 379, 380) renders unlawful any '*undue or unreasonable*' preference or advantage, prejudice or disadvantage. In the same section the requirement of 'all reasonable, proper, and equal facilities for the interchange of traffic' is qualified so as not to require one carrier to give the use of its tracks or terminal facilities to another." (p. 481) * * *
>
> "The evidence tends to show, if it does not render it clear, that certain yards and tracks representing more than one-third of the aggregate value of the leased lands are used almost if not quite exclusively by the brewery; and raises a question whether some of the other yards, or portions of them, are not like those mentioned, actually used rather as parts of the brewery plant than as parts of the transportation system of the Railway." (p. 495.)

The subject of *Interstate Commerce Comm.* v. *Stickney*, 215 U. S. 98, was a railroad rate for freight service terminating at stock yards in or near Chicago. The aggregate rate was split by the Interstate Commerce Commission and separate consideration given to so much as covered the railroad haul proper and to the part covering the delivery to stock yards. In deciding the reasonableness of the latter part of the charge, the court said (p. 109):

> "Under those circumstances it seems impossible to avoid the conclusion that, considered of and by itself, the terminal charge of two dollars a car was reasonable. If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards it would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced the Union Stock Yards Company will suffer loss while the real wrongdoers will escape. It may be that it is more convenient for the Commission to strike at the terminal charge, but the convenience of commission or court is not the measure of justice."

In *Southern Railway Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, the validity of a special charge made by the carrier to cover the stopping and unloading of goods in transit for inspection and reloading was upheld by this court. The court said (p. 301):

> "If the stopping for inspection and reloading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of that privilege. It is justified in receiving some compensation in addition thereto. A carrier may be under no obligations to furnish sleeping or other accommodations to its passengers, but if it does so it is not limited in its charges to the mere cost, but may rightfully make a reasonable profit out of that which it does furnish. Especially is this true when, as here, the privilege is in no sense a part of the trasportation, but outside thereof."

In some cases this court has held that carriers should not be paid for special services in transferring or other-

wise handling goods between connecting lines or between railroad tracks and places of storage; but the controlling consideration in these cases was (1) that the particular thing done was a part of the transportation, in a strict sense, or (2) that it was named along with transportation, in the bill of lading or other contract.

(2) Appellant's traffic officers, in view of the benefit it would receive from growth of the coal trade out of Mobile and Pensacola, figured that if it received $1.00 per ton for transportation, as the whole revenue when shipments were from points on its own line or as its distributive proportion when the shipments originated on lines of other carriers, it could afford to suffer the expense of spotting the cars and hoisting the coals, but that the traffic, at less revenue for the transportation, would not bear those charges; and so a tariff was made for the two conditions, open to all comers If, for example, some gross rate less than $1.00 were fixed for a new mining concern on its first legs, located on one of appellant's lines, or if, when the mine was served by some other carrier which connected with appellant's line, say, at Birmingham or Calera, and the distribution of the rate was such that less than $1.00 accrued to appellant—or if for any other personal or special reason appellant would have to accept something less than $1.00 per ton—then the spotting and switching charges would fall on the shipper. Nothing is said in the tariff, no distinction is made, as to the reasons why appellant's revenue would be less than $1.00 per ton; and so there was nothing invidious in saying that if the Government, on the score of a land-grant, paid such less rate it must, like others paying into appellant's treasury the same amount, pay also for the spotting and hoisting.

On fair analysis it will be seen that appellant received

no consideration from the Government for free spotting and switching when less than $1.00 per ton was due to appellant on account of the transportation.

Even on land-aided track the Government is not entitled to abatement of rates or anything associated with the transportation but for which specific, separate compensation is fixed. When fresh meats are shipped in a refrigerator car, the ordinary transportation rate is paid plus a special rate for refrigeration; and grain in shipment is sometimes handled by elevators, for which special compensation is paid. In such cases, even though the whole movement, with all its incidents, occurred on land-aided track, it is well that the Government must pay full compensation for the special facilities. No Government aid was given for the construction of those and therefore the Government is not entitled to any reduced rates for the use thereof.

The exemption from spotting and hoisting charges, by the terms of the rate scheme in suit, was, on "coal paying the Louisville & Nashville R. R. to Mobile, Ala., and Pensacola, Fla., a road haul revenue of $1.00 per ton of 2,000 pounds, or more." The argument of the Government's chief accounting officers is that when, say, on a haul from Birmingham to Mobile the Louisville & Nashville Railroad Company receives, as against a gross rate of $1.10 a ton, road haul revenue of 69.3 cents a ton, this exemption is due because the company, years and years ago, received something for which it since has been paying, and is now paying by receiving 40.7 cents less from the grantor than it receives from other shippers. These officers read the tariff supplement as if it read: "On coal paying the Louisville & Nashville R. R. to Mobile, Ala., and Pensacola, Fla., a road haul revenue of $1.00 per ton or more, or on which that minimum road haul revenue would be payable

except for some preceding transaction between the rail road companies and the shippers." The Government had made the mistake of confounding "revenue" with property.

It is not enough to say that revenue is one thing and property is another; there is not even any fixed relation between the two. One may have received a large gift of property from another and yet never received any revenue thereafter from that property, or indeed from any other, and so have to live off the corpus of his estate. The administrators of the Government's treasury have had ample reminders of this fact in late years. In many cases with which the Internal Revenue bureau has had to deal there have been returns, and proof, of no revenue (income) received whatever by persons who, in respect of property ownership, are very rich.

A railroad company, however rich, does not obtain revenue from everything that it does. It transports many passengers, and some freights, free of charge; but its tariffs are made with reference to the actual revenue it expects to receive and can not take account of free passes for passengers, or freight charges remitted to charitable organizations, or anything of the kind. The tariff here concerned took no account of any property of the railroad company, from whatever source derived; and the concession of free spotting and hoisting rested upon one, and only one condition precedent, viz: that there was going into the company's treasury $1.00 or more for the transportation of each ton of these coals handled.

On any shipments for which the rate, or appellant's part thereof, was $1.00 per ton or more the Government could have obtained free spotting and hoisting by paying the full rate. This, no doubt, would have been done if

the spotting and hoisting charges had been more than the land-grant deductions attaching ordinarily to the mileage employed in the transportation. The Government has elected not to pay the stipulated, full compensation; and therefore it is chargeable with the spotting and hoisting charges.

Generally speaking, the only difference between railroad traffic for Government and for private account is that in the former payment is made at the time of the service. Theoretically this is of little importance, since it is expected that the Government's disbursing officers will do their work expeditiously and fairly. Yet the postponement of cash payment has been often held (1) to bar for Government use tariffs of special, low rates published for private parties of ten or more passengers and (2) as between one of two private shippers, to constitute an unlawful discrimination. Now cash is only one kind of revenue; and if the coal tariff here in question had expressly stipulated for spot-cash payment of revenue to the amount named, the Government, unless paying in spot cash, would not be entitled to the immunities named. How then can it be entitled to those immunities when, to the extent of one-third or more of a one-dollar rate, it does not pay the railroad company any revenue, or promise to pay it any, at any time.

BENJAMIN CARTER,
Attorney for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
THE UNITED STATES
} No. 29

MOTION FOR ORAL ARGUMENT

This appeal, having been dismissed by the court on October 7th, 1924, because appellant had not been able to make the preparations for a hearing, was reinstated the same day to be heard on a brief filed for appellant within thirty days from that date. There had been decided on May 26, 1924, a case of the *Illinois Central Railroad Company*, 265 U. S. 209, and in a brief filed herein for the United States it was insisted that the case was ruled by that decision and others cited, and reference was made to a case of the *Chicago, Milwaukee & St. Paul Railway Company*, No. 83, of the present term, as being parallel with this case and with the Illinois Central case.

There is some similarity, though not identity, between the Chicago, Milwaukee & St. Paul and Illinois Central cases. The former of these is set for hearing

on November 17th, 1924. The instant case presents a question which does not occur in either of those, and has no relation whatever to anything involved in either of them and is absolutely novel in this court, and, on the remaining questions presented, there is nothing to associate the case with the other case beyond the fact that coals, for use on Government improvements, were transported over land-aided railroads; the stipulations between the Government and its vendors, regarding places of delivery and of payment for the supplies, and some other provisions in the contracts, being radically different from those of the Illinois Central case.

It is submitted that, especially on the first issue here referred to, appellant, while presenting now and filing its brief, is not able thereby to make an adequate presentation of the case. It therefore moves that, upon submission of this case on the 16th day of November, or at any time in said month preceding the 17th, consideration of it by the court be deferred until that day and the time due to appellant for argument of the Chicago, Milwaukee & St. Paul case be divided by appellant so that he may devote a minor part thereof to the instant case.

BENJAMIN CARTER,
Attorney for Appellant.

COPY.

Benjamin Carter,
Attorney and Counselor at Law,
1400 H Street, N. W.,
Washington, D. C.

December 6, 1924.

In re Louisville & Nashville Railroad Company vs. United States No.29.

The Chief Justice of the United States
Supreme Court,
Washington, D. C.

Sir:

This case, heard by the court on the 4th instant., amounts to two suits. Also a case of the Chicago, Milwaukee & St. Paul Railway Co., heard at the same time, was in effect two suits. I write now especially of that part of the Louisville & Nashville case which relates to exemption from charges for switching cars and chuting coal at Mobile and Pensacola. This was absolutely new matter to the court; and it got the benefit of barely twenty minutes of the one hour allowed to the four controversies.

A lawyer of the highest prowess, in sound health, could hardly have made the issue clear to the court in that little time. I am sure that, in some important details, I did not; and I have the honor to advise you that in a very few days I shall ask leave to make a motion for a remand of the case for a half hour's re-argument on this branch--the Government, if its attorneys desire, also to be heard.

Some of the matters calling for clarification are:

1. The identity of the coals for which the Government refused to pay the terminal charges with the coals (the subject of the other branch of the suit) which were purchased by engineers of the Army or Navy, viz: Colonel Keller, Major Schulz, Major Brown, Captain Sturdevant, Major Johnson, and Assistant Paymaster Bearfind, as bearing on the uses which were to be made, and were made, of the coals stopped and cuted so that distinction may clearly be made between (a) exports or bunkerage for ship use and (b) domestic uses, coastwise or others.

2. Appellant's compensation to be recovered if the Government, being entitled to the land-grant rates for transportation on a part of the haul, was not entitled to exemption from the switching and chuting charges.

3. Appellant's compensation to be recovered if the Government, not being entitled to land-grant deductions on said haul, was entitled to exemption from the switching and chuting charges.

4. The character and uses of the switching and hoisting

appliances, so as to determine whether, upon the question of lawful discrimination, they fall under Section 2 or Section 3 of the Act of Congress of February 4, 1887, Chapter 104, 24 Stat. 379, 380.

5. Validity of a tariff, or of free service, restricted to export coals as against coals for domestic use.

Very respectfully,

(Signed) Benj. Carter.

Copy to the Solicitor General, Washington, D. C., for attention of Mr. Blackburn Esterline.

OFFICE OF THE CLERK
RECEIVED
MAY 11 1925
SUPREME COURT U. S.

IN THE

Supreme Court of the United States

October Term, 1924

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY
v.
THE UNITED STATES
} No. 29

MOTION OF APPELLANT FOR RE-HEARING

Appellant, showing to the court that a judgment was rendered by this court, with an opinion, on the 2nd day of March, 1925, affirming a decision of the Court of Claims by which the petition was dismissed, moves that a re-hearing of the case be granted. For its reasons it says:

Beside one question relative to a part only of the moneys claimed there were two questions before and decided by the Court of Claims, and presented to this court, relative to an alternative amount claimed, and this court decided one but omitted to decide the other of said two questions; and therefore appellant is exposed to the application of said unfavorable judgment, and to large abridgement of its revenues, by disbursing officers of the United States, or by other shippers, on

transactions which were in no way concerned with said decided question but do present the undecided question.

BRIEF

The first concern of appellant's counsel, undersigned, is to assure the court that this application for a re-hearing would not be made if the court, by its silence upon one capital question, had not given pseudo-authority, with respect both to Government shipments and to private shipments, for a practice of which the suit complains.

One question before this court, which was decided and is discussed in the opinion, is the ownership of coal and other materials for Government uses which while in transit to points of use were under the dominion of the shippers (sellers), and which were subject to inspection and final acceptance or rejection after the shipment terminated. The present motion has no relation to that question. Another and distinct question was whether land-grant allowances received by the Government should be counted as the equivalent of cash so as to satisfy a condition in the special tariffs concerned that appellant's revenue from shipments of coal should be one dollar or more per ton before shippers should be entitled to free spotting or cars and chuting of the coal at the seaports. New consideration of that question is not requested; it is referred to here solely to make it clear that the court puts the Government on the same footing with private owners, who must pay the full tariff rates in cash. The one matter which this motion presents to the court is a second condition of the tariff referred to, viz: that the spotting and hoisting should be steps in the export of coals—that there should be no waiver

of these terminal charges on coals moving coastwise, for engineering or other uses.

The coals here in question, as found by the court, were for engineering uses along the Mississippi Sound or in Mobile River. None of them, by any stretch of the word, were for export.

Coal producers in Alabama send large quantities of coal by rail to Mobile and Pensacola and thence, by ship, to towns along Mississippi Sound or the Gulf of Mexico, all for private contractors or blacksmithing or domestic uses. No matter how long the railroad haul might be, nor how large the resulting revenues to the Louisville & Nashville Railroad Company, no rational person concerned in the shipment would claim for those free spotting and hoisting. These coals are not for export, and that is the end of the matter.

To repeat: (1) The Government and (2) other shippers are on the same footing by these tariffs, because constructively they pay the same rates between the same terminal points. But, to say the least, it is clear that they are on the same footing as regards the character of coals entitled to free spotting and hoisting; and therefore the Government is not entitled to the immunity with respect to coals not for export which the private owner and shippers can not claim. The effect of the decision then is that coals, whether for Government or for private account, though shipped for local and domestic uses, if paying in any way the stipulated minimum of shipping charges, shall go free of the spotting and hoisting charges.

It can not be said, to support the judgment on the terminal charges claimed, that the Government had two answers to the claim and that, one of those being held by this court to be good, it is of no consequence that no decision was made on the other. The Government had not two defenses, but one defense of two

interdependent parts, viz: (1) that the coals in question were a subject of the special tariffs invoked and (2) that, in legal effect, there were paid for this service the full rates stipulated in those tariffs. All that the court decided is that those rates were paid. This was immaterial and did not justify a judgment in the Government's favor if the coals were not for export and the tariffs, offering free switching and hoisting, did not apply.

Accepting as correct and final the decision that these coals were property of the Government while in transit, appellant submits that the frame of the judgment should be:

"The Government was substantially the owner of the freights and therefore was entitled to the land-grant abatements stated in findings IX, XI, XII and XIII of the Court of Claims, totaling $12,609.18.

"Including said land-grant abatements, the rates accruing to appellant on said shipments were one dollar per ton or more; but the coals were shipped, by said use of the terminal appliances, to coastwise points, entirely for engineering uses, not for export, and therefore appellant was and is entitled to recover the amount of said transfer charges, also stated in said findings IX, XI, XII and XIII, totaling $3,571.19.

There is no question presented, under this motion, of a waiver by appellant of the terminal charges. It did concede the land-grant abatements in its bills but claimed, as bases, the full tariff rates undiminished by spotting-and-hoisting charges.

BENJAMIN CARTER,
Attorney for Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1924

No. 29

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

Appellant, a land-grant railroad company, in 1915, 1916, and 1917 published and filed coal rates *via* Birmingham and Flomaton to Mobile and Pensacola for bunkerage and purposes other than export of $1.10, $1.10, and $1.15 per ton of 2,000 pounds from Groups 1, 2, and 3, respectively. (Tr. 7; 57 Ct. Clms. 269.)

The tariffs further provided that on coal paying the L. & N. a road-haul revenue of $1 per ton or more to Mobile and Pensacola the cost of trans-

15679—24

ferring the coal from cars onto barges or into vessels through the hoists at Mobile and Pensacola will be assumed by the L. & N.; on coal paying the L. & N. to Mobile and Pensacola a road-haul revenue of less than $1 per ton the cost of transferring the coal from cars onto barges or into vessels will be 10 cents per ton plus $2 per car switching or spotting charge in addition to the freight rate, subject, however, to a maximum total charge of $1 per ton, including transportation and hoisting and switching (or spotting) service. (Tr. 7; 57 Ct. Clms. 269, 271.)

The following transactions are involved:

1. On March 15, 1915, Gulf States Coal Company contracted with Engineer Corps to furnish and have delivered 18,000 tons of coal from the Dixiana mines onto United States barges, or in bunkers, in carload lots from hoists at Mobile, at $1.38 per ton, the United States to pay the freight thereon and the contractor to transfer the coal at its expense to the barges, the coal to be inspected either when it was loaded on or unloaded from the cars. The coal was shipped to Mobile on Government bills of lading, which were accomplished, the coal inspected at that place, and none of it was rejected. Part was delivered for Government engineering work at or near Mobile, and part was switched to wharves of the Mobile Coal Company and loaded from its hoists onto Government barges, which were towed by Government tugs to Fort Morgan, Pascagoula, and Gulfport, all on the Gulf coast west of Mobile, where it was to be used for Government engineering work.

For the coal to be used at Mobile, the transportation was paid for by the Government at the basic rate of $1.10 per short ton, and that to be used near Fort Morgan, Pascagoula, and Gulfport at the basic rate of $1 per short ton, with land-grant deductions therefrom. L. & N. rendered its bills to the Government for Auditor's settlement, on the approved form of voucher for transportation, land grant involved, upon which it stated the basic rate and the amount to be deducted on account of land grant, and claimed the net amount remaining after the deduction of the land grant.

In no case did it claim payment upon other than a land-grant basis, but it included in its bills and claimed switching, or spotting, and hoisting charges. The Auditor disallowed the switching and hoisting charges, but otherwise allowed the claims as filed, except that on two shipments the Auditor determined the basic rate to be $1 per ton instead of $1.10 per ton, as claimed, and corrected the land grant accordingly. L. & N. protested the disallowance of the switching and hoisting charges (except as to settlements set out in Finding XIII, as to which no protests of any kind were made), and protested also the application of the $1 per ton basic rate instead of the $1.10 per ton rate on bills of lading numbered 24451 and 24452. As to the disallowances in the Auditor's settlement covering these two bills of lading, L. & N. applied to the Comptroller of the Treasury for a revision of the settlement. It claimed the basic rate of $1.10 per ton and that after land-grant

deductions the road-haul was less than $1 per ton, and therefore the switching and hoisting charges applied. The Comptroller held that charges for Government transportation are based upon commercial rates from which land-grant deductions follow by operation of law; that the $1 rate was the proper rate on the shipments involved and disallowed the switching and hoisting charges. (Tr. 9).

2. On August 21, 1916, Imperial Coal & Coke Company contracted with the Engineer Corps to deliver on the cars at its mines at Dixiana 12,000 tons of coal at $1.50 per ton. (Tr. 9; 57 Ct. Clms. 272.) The specifications provided for adding the land-grant freight rate from the mines to Mobile to the price bid for mine delivery for comparison of bids, and that the coal should be inspected when loaded on or unloaded from the cars, which was subject to rejection until final inspection and acceptance. This coal was also shipped on Government bills of lading over the L. & N. to Mobile, and appears to have been handled and disposed of in a manner similar to that of the shipments of the Gulf States Coal Company with the same course in respect to presentation of bills by the L. & N. with land-grant deductions, which were paid by the Government, minus the additional switching and hoisting charges which were disallowed by the Auditor. (Tr. 9, 10; 57 Ct. Clms. 272.)

3. In 1914, 1915, 1916, and 1917 other coals (part without formal contract) were purchased on advertisements, specifications, bids, and acceptances from

different mines in the Birmingham district to be shipped to the engineer officer at Pensacola (Tr. 10; 57 Ct. Clms. 273), on Government bills of lading, which were duly accomplished, and the coal inspected and accepted at Pensacola by the proper Government officials. The coal was for use at or near Pensacola and was paid for at the rate of $1.10 per ton. (Tr. 11; 57 Ct. Clms. 274.)

4. On April 8, 1915, Zimmern Coal Company bid $3.59 per long ton, or if Government bills of lading should be furnished, $2.36 per long ton, to furnish 250 long tons of coal to the Assistant Paymaster on the U. S. S. *Tonopah*, Naval Station, Pensacola, to be delivered alongside the vessel at Pensacola on April 20, 1915, free of charge, subject to the usual inspection and test. The bid of $2.36 per long ton was accepted and Government bills of lading were furnished for the shipment. The L. & N. transported the coal and the land-grant deductions were made. (Tr. 11; 57 Ct. Clms. 274.)

Under the contract with the Gulf States Coal Company, L. & N. made no protest whatever against settlements for transporting coal to Mobile under sixteen separate and distinct bills of lading on which the land-grant deductions were made and from which the hoisting and switching charges were disallowed by the Auditor; nor did the L. & N. protest against settlement for transporting coal to Mobile under the contract with Imperial Coal & Coke Company on four bills of lading on which the land-grant deductions were made and from which the hoisting

and switching charges were disallowed by the Auditor. (Tr. 11; 57 Ct. Clms. 274.) Nor did the L. & N. protest against settlement for transporting coal to Pensacola on two other Government bills of lading on which land-grant deductions were made and the hoisting and switching charges disallowed by the Auditor. In all other cases the L. & N. protests were limited to the disallowances of switching and hoisting charges and the adoption of the $1 basic rate instead of the claimed $1.10 rate as to the shipments covered by two bills of lading. (Tr. 12; 57 Ct. Clms. 275.) The Court of Claims found the $1 rate was correct. (Tr. 13; 57 Ct. Clms. 277.)

The Court of Claims further found that the regulations of the Treasury Department in force at the time the coal in question was hauled, provided that Government bills of lading were to be issued for the transportation of Government property only; that prepayment of charges in no case was to be demanded by the carrier, nor collected from the consignee; that presentation to the officer indicated on the face of the bill of lading, when properly accomplished, and attached to the freight voucher prepared on the authorized Government form, payment was to be made to the last carrier, unless otherwise specifically stipulated; that when shipments were made under contract or special rates notation of such fact should appear on the face of the bill of lading; that shipments were required to be made at the restricted or limited valuation specified in the tariff or classification at or

under which the lowest rate was available unless otherwise indicated on the face of the bill of lading. (Tr. 12; 57 Ct. Clms. 275.)

There was no evidence that the L. & N. knew of the terms of all or any of the contracts or orders, nor was there evidence proving or tending to prove that the L. & N. was deceived, misled, or mistaken as to any material fact, or that it did not act, in presenting its bills at land-grant rates, with full knowledge of all of the facts. (Tr. 12; 57 Ct. Clms. 275.) The Court of Claims dismissed the petition *in toto*. (*Louisville & Nashville Railroad* v. *United States*, 57 Ct. Cls. 268.)

ARGUMENT

The case is companion to *Illinois Central Railroad* v. *United States*, 265 U. S. 209, and *Chicago, Milwaukee & St. Paul Railway* v. *United States*, No. 83, this Term. The *Illinois Central* case and the instant case were fixed for hearing together as Nos. 248 and 247 at the last Term and were reached on April 28, 1924.

When the instant case was called for argument with the *Illinois Central* case last April the record in the *L. & N.* case had not been printed and the case was passed for the Term on the stipulation [1] of counsel.

---

[1] That stipulation is as follows:

"It is hereby stipulated and agreed that the printing of the record in this case, the briefing and hearing be deferred until the decision of this Court has been announced in the case of *Illinois Central Railroad Co.* v. *United States*, No. 248, on the docket of this Court for the October Term of 1923."

The *Illinois Central* case was argued and on May 26, 1924, this Court affirmed the judgment of the Court of Claims. On June 9, 1924, this Court denied the petition of the Illinois Central for rehearing.

On the authority of the *Oregon-Washington Railroad* v. *United States*, 255 U. S. 339, the Court of Claims dismissed both the instant case (57 Ct. Clms. 268) and the *Illinois Central* case (57 Ct. Clms. 277). The *Chicago, Milwaukee & St. Paul* case was dismissed by the Court of Claims without citation of authority (57 Ct. Clms. 569).

On the authority of the *Oregon-Washington, etc.*, case, *supra*, on October 13, 1924, in *Northern Pacific Railway* v. *United States*, No. 21, this Term, this Court, *per curiam*, affirmed the judgment of the Court of Claims in a similar case.

To prevail, therefore, appellant must overthrow a mountain range of opinions adverse to its contentions, viz:

Oregon-Washington Railroad & Navigation v. *United States*, 255 U. S. 339;

Illinois Central Railroad v. *United States*, 265 U. S. 209;

Northern Pacific Railway v. *United States*, per curiam, October 13, 1924;

Louisville & Nashville v. *United States*, 57 Ct. Clms. 268;

Illinois Central v. *United States*, 57 Ct. Clms. 277;

Chicago, Milwaukee & St. Paul v. *United States*, 57 Ct. Clms. 569.

The argument that the L. & N. is entitled to recover the hoisting and switching charges because the application of the land-grant rates reduced the rate to the L. & N. to less than $1 per ton may not prevail because, as held by the Court of Claims, "Government rates over land-aided roads are always predicated on commercial rates from which deductions follow by operation of law in return for benefits conferred." (Tr. 13.) In other words, the Government is entitled to have its freight carried at regular commercial rates to be paid partly in cash and partly in land grants. Appellant would disregard the land-grant payments utterly and then seek to recover from the Government on the ground that it had been accorded reduced freight rates because the L. & N. received the benefit of land grants, and thereby the Government became liable for the hoisting and switching charges. This self-destructive proposition may be passed.

The judgment of the Court of Claims should be affirmed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

○

(32)

SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1924.

The Louisville and Nashville Railroad Company, Appellant, *vs.* The United States.	Appeal from the Court of Claims.

[March 2, 1925.]

Mr. Justice Butler delivered the opinion of the Court.

This action was brought in the Court of Claims to recover the amount by which tariff rate freight charges on certain coal were reduced by government land-grant deductions; and also to recover certain charges for switching and handling. The court made findings of fact, and gave judgment for defendant. 57 Ct. Cl. 268. One of the lines of appellant's railroad enters Alabama from the north and extends southerly through Decatur, Birmingham and Flomaton to Pensacola, Florida, and thence easterly to River Junction, Florida. This is a land-aided line. Appellant has another line extending southwesterly from Flomaton to Mobile. At Mobile and Pensacola, it owns wharves and hoists for transferring coal from cars to boats, and has constructed switches from its main line to the wharves. All of these were built without government aid. The wharves and hoists at Mobile are operated by a coal company and those at Pensacola by appellant.

All the coal in question came from mines in the Birmingham district and was purchased by the United States for engineering work at Mobile, Pensacola and other places on or near the Gulf, except 250 tons bought for the use of the U. S. S. *Tonopah*. It was transported on government bills of lading and was carried in whole or in part by the use of such land-aided railroad. The coal was furnished to the United States under a contract with the Gulf States Coal Company of March 15, 1915, a contract with the Imperial Coal and Coke Company of August 21, 1916, advertisements, specifications, bids and acceptances without formal

contracts between November 2, 1914 and September 10, 1917, and a bid and acceptance as of April 8, 1915, for the *Tonopah*.

The Court of Claims held that all shipments, except those made under the contract of March 15, 1915, were subject to land-grant deductions. Appellant maintains that none was subject to the reduced rates. We are of opinion that all the coal, except that furnished the *Tonopah*, was delivered to and became the property of the United States before it was hauled by appellant, and was entitled to the reduced rates.

The general rule is that, if a consignee accepts a shipment, he becomes liable as a matter of law for the full amount of freight charges. *Louisville and Nashville R. R.* v. *Central Iron Co.*, 265 U. S. 59, 70; *Pittsburgh, &c. Ry. Co.* v. *Fink*, 250 U. S. 577, 580. Under the land-grant acts, the United States was entitled to the reduced rates if the coal when hauled was its property. Acts of May 17, 1856, June 3, 1856, and March 3, 1857, 11 Stat. 15, 17, 200; Acts of April 10, 1869, and March 3, 1871, 16 Stat. 45, 580; Act of March 3, 1875, 18 Stat. 509. *Illinois Central R. R.* v. *United States*, 265 U. S. 209. But the mere use of government forms of bils of lading is not conclusive on the question of ownership of property at the time of transportation, and does not give the United States the right of transportation at land-grant rates. See *Transportation Involved in Furnishing Articles by Contractor*, 20 Comp. Dec. 721, 723.

The contract of March 15, 1915, was made pursuant to advertisement and specifications. The specifications, which were attached to and made a part of the contract, show that, in order to permit the United States to take advantage of land-grant rates, the form of proposal contemplated either "delivery of the whole quantity at the mine, from which shipment will then be made on Government bill of lading to Mobile, Pascagoula, or Gulfport, as may be necessary, or delivery of about 7,000 tons at Mobile, Ala., about 5,000 tons at Pascagoula, Miss., and about 6,000 tons at Gulfport, Miss." And it was specified: "The United States will select the method of delivery which under the proposals received proves to be most economical and advantageous. If mine delivery is selected, the coal will be ordered in carload lots for shipment on Government bills of lading to be furnished by the contracting officer, but the contractor will be required to transfer it from cars

to barges belonging to the United States and will therefore include in his price his cost for so transferring the coal at all three points of delivery. . . . If prices based on delivery at Mobile, Pascagoula,, and Gulfport prove to be more advantageous, then these prices will be accepted and order will be given for carload lots or less as may be required on board United States barges or in bunkers" at the three places named. The contract contains the following: "In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish and have delivered on United States barges, or in bunkers, from hoists, in carload lots, at Mobile, Alabama, when requested, eighteen thousand short tons, more or less. . . . Coal to be shipped on Government bill of lading, to be furnished by the contracting officer, the United States to pay railroad freight charges between Dixiana [where the mines were located] and Mobile and the contractor to provide for transferring the coal from cars to United States barges and to pay all demurrage charges that may accrue." The United States reserved the option to call on the contractor to tow the coal from Mobile to Pascagoula and Gulfport and agreed to make additional payments for that service, and also reserved the right to inspect and test the coal after transportation and to reject such as did not conform to specifications. The purchase price was to be paid after delivery and final acceptance.

The language "shall furnish and have delivered on United States barges . . .", if it stood alone, might be taken to indicate that delivery was to be made after transportation. But when read, as it must be, with the advertisement and specifications, and in the light of what was done, it appears with reasonable certainty that delivery at the mines was contemplated. The specifications distinctly show that if mine delivery should be selected, the coal would be ordered in carload lots and shipped on government bills of lading. In harmony with that provision, the contract required shipment in carload lots on forms of bills of lading furnished by the contracting officer, and bound the United States to pay freight charges from the mine to Mobile. This meant that the contractor was not to be concerned with or responsible for the transportation by rail. But, if delivery at gulf ports had been selected, the contractor would have been bound to hire the carrier and to pay the

freight. The provisions of the contract and specifications together amount to a declaration of the parties that there was to be delivery of the whole quantity at the mine, and the conduct of the parties was in harmony with that purpose and inconsistent with an intention that delivery to the United States should be made after transportation by rail was ended. The general rule is that title passes from seller to buyer with the delivery of the goods. All the coal except that furnished the *Tonopah* was delivered by the seller to the United States at the mines on board railroad cars of appellant, a common carrier designated by the United States by the furnishing of government bills of lading. It must be held that title passed at the time of such deliveries. See *United States* v. *Andrews,* 207 U. S. 229, 240, 243.

The contract contemplated service by the contractor, as well as the sale of coal. The contractor agreed to have the coal transferred from cars to government barges, his compensation therefor to be included in the price, and agreed for specified prices to tow it to points on the Gulf coast, if requested so to do, and also undertook to furnish and deliver at various places some 9,000,000 gallons of fresh water for steam and drinking purposes. The services were not essential to or part of the sale, and, as against the other facts found, the agreements to transfer and tow the coal do not indicate that the parties intended that delivery by the seller to the purchaser should not be made until after transportation. *Hatch* v. *Oil Co.,* 100 U. S. 124, 137; *McElwee* v. *Metropolitan Lumber Co.,* 69 Fed. 302, 305; *H. Baars & Co.* v. *Mitchell,* 154 Fed. 322, 326.

The United States reserved the right to inspect and test the coal after transportation and to reject it, if found not to conform to specifications. None of the coal was rejected. This right was not inconsistent with transfer of title to the United States at the time of delivery of the coal on cars at the mine. *Delaware, Lackawanna & Western R. R.* v. *United States,* 231 U. S. 363, 371, 372; *Illinois Central R. R.* v. *United States, supra.*

By the contract of August 21, 1916, the seller expressly agreed to deliver the coal on railroad cars at the mines at Dixiana. Deliveries of the coal furnished without formal contracts were covered by specifications which were the same as those forming a part of the contract of March 15, 1915.

The conclusion that the coal furnished the *Tonopah* was to be delivered at the mine is not sustained by the facts found. Under the invitation to bid, proposal and acceptance, delivery was to be made alongside the vessel at Pensacola. The coal was transported on government bills of lading. The United States paid the freight less land-grant deductions. The use of government bills of lading and the payment of reduced charges by the United States are not sufficient to sustain a finding that the coal was the property of the United States when hauled by appellant. There is nothing to indicate that title passed before delivery at the vessel.

We agree with the Court of Claims that acceptance of payment of the land-grant rates concludes appellant. Its conduct was inconsistent with an intention to claim the amount of land-grant deduction, as to any of the coal. Appellant rendered bills as to the coal furnished under the above mentioned contracts of March 15, 1915 and August 21, 1916, upon which it stated the basic rate and the amount to be deducted on account of land grant, and claimed the net remaining after the deduction. There was no evidence tending to show that, in presenting its bills at land-grant rates, appellant did not act with full knowledge of all the facts. Settlements for transporting some of the coal were made after the commencement of this suit, April 26, 1916, but before the amended and supplemental petition was filed, January 9, 1922. Appellant did not protest against any land-grant deductions. It is bound by its acquiescence and consent and cannot recover the amounts deducted. *Oregon-Washington R. R. Co.* v. *United States*, 255 U. S. 339, 345; *New York, New Haven & Hartford R. R.* v. *United States*, 251 U. S. 123, 127; *New York, New Haven & Hartford R. R.* v. *United States*, 258 U. S. 32; *Louisville & Nashville R. R.* v. *United States*, 258 U. S. 374.

The Court of Claims was right in disallowing additional pay for switching cars to wharves or for transferring coal from cars to boats. The tariff rates on this coal for bunkerage and purposes other than export or coastwise traffic were $1.10 per short ton via Flomaton to Mobile or Pensacola. Under the tariff the cost of transferring such coal from cars to vessels at Mobile and Pensacola was assumed by appellant, where the road haul revenue was $1 per ton or more; but if such revenue was less there was an additioal charge of ten cents per ton, plus $2 per car for

switching, subject to a maximum of $1 per ton. After land-grant deduction, the balance to be paid in money was less than a dollar per ton. But the land grant, made many years ago, in aid of the railroad enterprise was not a mere gift or gratuity. See *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 679. The carrier's obligation to haul property of the United States at reduced rates was a part of the consideration for which the land grant was made. Part of appellant's compensation for hauling the coal was paid in land, and the balance was paid in money. It cannot be said that the total was less than a dollar per ton.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 29. Argued December 4, 1924—Decided March 2, 1925.

1. Contracts for sale and delivery of coal to the United States, *construed*, with the advertisements, specifications and conduct of the parties, as providing for delivery on cars at the mine; so that title passed then and the railroad transportation, on government bills of lading, was subject to land-grant rates. P. 397.
2. Provisions in such contracts for service by the vendor in transferring the coal to barges at railroad destination, compensation therefor to be included in price of coal; and reserving right of United States to test coal after transportation and reject it if

not up to specifications,—*held* not inconsistent with passing of title at time of delivery on cars at the mine. P. 400.

3. Where the United States contracted for coal to be shipped by rail and delivered at a vessel, use of government bills of lading, and payment of freight by the United States at land-grant rates, were not enough to sustain a finding that the coal was the property of the United States when hauled by the railroad. P. 401.
4. When a railroad company, entitled to charge the United States the full tariff rate, charges and receives the reduced land-grant rate with full knowledge of the facts, it is bound by its acquiescence and cannot recover the difference. *Id.*
5. Where, under its tariff, the right of a railroad to charge extra for switching and transferring coal at destination depends upon road-haul revenue being equal to as much as a stated rate per ton, land-grant deductions from the latter allowed the United States are not to be considered in determining its liability to such extra charges. P. 402.

57 Ct. Cls. 268, affirmed.

APPEAL from a judgment of the Court of Claims rejecting the Railroad's claim for transportation, switching and handling of freight for the United States.

Mr. Benjamin Carter, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States, submitted.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was brought in the Court of Claims to recover the amount by which tariff-rate freight charges on certain coal were reduced by government land-grant deductions; and also to recover certain charges for switching and handling. The court made findings of fact, and gave judgment for defendant. 57 Ct. Cls. 268. One of the lines of appellant's railroad enters Alabama from the north and extends southerly through Decatur, Birmingham and Flomaton to Pensacola, Florida, and thence easterly to River Junction, Florida. This is a land-aided

line. Appellant has another line extending southwesterly from Flomaton to Mobile. At Mobile and Pensacola, it owns wharves and hoists for transferring coal from cars to boats, and has constructed switches from its main line to the wharves. All of these were built without government aid. The wharves and hoists at Mobile are operated by a coal company and those at Pensacola by appellant.

All the coal in question came from mines in the Birmingham district and was purchased by the United States for engineering work at Mobile, Pensacola and other places on or near the Gulf, except 250 tons bought for the use of the U. S. S. *Tonopah*. It was transported on government bills of lading and was carried in whole or in part by the use of such land-aided railroad. The coal was furnished to the United States under a contract with the Gulf States Coal Company of March 15, 1915, a contract with the Imperial Coal and Coke Company of August 21, 1916, advertisements, specifications, bids and acceptances without formal contracts between November 2, 1914 and September 10, 1917, and a bid and acceptance as of April 8, 1915, for the *Tonopah*.

The Court of Claims held that all shipments, except those made under the contract of March 15, 1915, were subject to land-grant deductions. Appellant maintains that none was subject to the reduced rates. We are of opinion that all the coal, except that furnished the *Tonopah*, was delivered to and became the property of the United States before it was hauled by appellant, and was entitled to the reduced rates.

The general rule is that, if a consignee accepts a shipment, he becomes liable as a matter of law for the full amount of freight charges. *Louisville and Nashville R. R.* v. *Central Iron Co.*, 265 U. S. 59, 70; *Pittsburgh, &c. Ry. Co.* v. *Fink*, 250 U. S. 577, 580. Under the land-grant acts, the United States was entitled to the reduced

rates if the coal when hauled was its property. Acts of May 17, 1856, June 3, 1856, and March 3, 1857, 11 Stat. 15, 17, 200; Acts of April 10, 1869, and March 3, 1871, 16 Stat. 45, 580; Act of March 3, 1875, 18 Stat. 509. *Illinois Central R. R.* v. *United States,* 265 U. S. 209. But the mere use of government forms of bills of lading is not conclusive on the question of ownership of property at the time of transportation, and does not give the United States the right of transportation at land-grant rates. See *Transportation Involved in Furnishing Articles by Contractor,* 20 Comp. Dec. 721, 723.

The contract of March 15, 1915, was made pursuant to advertisement and specifications. The specifications, which were attached to and made a part of the contract, show that, in order to permit the United States to take advantage of land-grant rates, the form of proposal contemplated either "delivery of the whole quantity at the mine, from which shipment will then be made on Government bill of lading to Mobile, Pascagoula, or Gulfport, as may be necessary, or delivery of about 7,000 tons at Mobile, Ala., about 5,000 tons at Pascagoula, Miss., and about 6,000 tons at Gulfport, Miss." And it was specified: "The United States will select the method of delivery which under the proposals received proves to be most economical and advantageous. If mine delivery is selected, the coal will be ordered in carload lots for shipment on Government bills of lading to be furnished by the contracting officer, but the contractor will be required to transfer it from cars to barges belonging to the United States and will therefore include in his price his cost for so transferring the coal at all three points of delivery. . . . If prices based on delivery at Mobile, Pascagoula, and Gulfport prove to be more advantageous, then these prices will be accepted and order will be given for carload lots or less as may be required on board United States barges or in bunkers" at the three places

named. The contract contains the following: "In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish and have delivered on United States barges, or in bunkers, from hoists, in carload lots, at Mobile, Alabama, when requested, eighteen thousand short tons, more or less. . . . Coal to be shipped on Government bill of lading, to be furnished by the contracting officer, the United States to pay railroad freight charges between Dixiana [where the mines were located] and Mobile and the contractor to provide for transferring the coal from cars to United States barges and to pay all demurrage charges that may accrue." The United States reserved the option to call on the contractor to tow the coal from Mobile to Pascagoula and Gulfport and agreed to make additional payments for that service, and also reserved the right to inspect and test the coal after transportation and to reject such as did not conform to specifications. The purchase price was to be paid after delivery and final acceptance.

The language "shall furnish and have delivered on United States barges . . .", if it stood alone, might be taken to indicate that delivery was to be made after transportation. But when read, as it must be, with the advertisement and specifications, and in the light of what was done, it appears with reasonable certainty that delivery at the mines was contemplated. The specifications distinctly show that, if mine delivery should be selected, the coal would be ordered in carload lots and shipped on government bills of lading. In harmony with that provision, the contract required shipment in carload lots on forms of bills of lading furnished by the contracting officer, and bound the United States to pay freight charges from the mine to Mobile. This meant that the contractor was not to be concerned with or responsible for the transportation by rail. But, if delivery

rates if the coal when hauled was its property. Acts of May 17, 1856, June 3, 1856, and March 3, 1857, 11 Stat. 15, 17, 200; Acts of April 10, 1869, and March 3, 1871, 16 Stat. 45, 580; Act of March 3, 1875, 18 Stat. 509. *Illinois Central R. R.* v. *United States*, 265 U. S. 209. But the mere use of government forms of bills of lading is not conclusive on the question of ownership of property at the time of transportation, and does not give the United States the right of transportation at land-grant rates. See *Transportation Involved in Furnishing Articles by Contractor*, 20 Comp. Dec. 721, 723.

The contract of March 15, 1915, was made pursuant to advertisement and specifications. The specifications, which were attached to and made a part of the contract, show that, in order to permit the United States to take advantage of land-grant rates, the form of proposal contemplated either "delivery of the whole quantity at the mine, from which shipment will then be made on Government bill of lading to Mobile, Pascagoula, or Gulfport, as may be necessary, or delivery of about 7,000 tons at Mobile, Ala., about 5,000 tons at Pascagoula, Miss., and about 6,000 tons at Gulfport, Miss." And it was specified: "The United States will select the method of delivery which under the proposals received proves to be most economical and advantageous. If mine delivery is selected, the coal will be ordered in carload lots for shipment on Government bills of lading to be furnished by the contracting officer, but the contractor will be required to transfer it from cars to barges belonging to the United States and will therefore include in his price his cost for so transferring the coal at all three points of delivery. . . . If prices based on delivery at Mobile, Pascagoula, and Gulfport prove to be more advantageous, then these prices will be accepted and order will be given for carload lots or less as may be required on board United States barges or in bunkers" at the three places

named. The contract contains the following: "In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish and have delivered on United States barges, or in bunkers, from hoists, in carload lots, at Mobile, Alabama, when requested, eighteen thousand short tons, more or less. . . . Coal to be shipped on Government bill of lading, to be furnished by the contracting officer, the United States to pay railroad freight charges between Dixiana [where the mines were located] and Mobile and the contractor to provide for transferring the coal from cars to United States barges and to pay all demurrage charges that may accrue." The United States reserved the option to call on the contractor to tow the coal from Mobile to Pascagoula and Gulfport and agreed to make additional payments for that service, and also reserved the right to inspect and test the coal after transportation and to reject such as did not conform to specifications. The purchase price was to be paid after delivery and final acceptance.

The language "shall furnish and have delivered on United States barges . . .", if it stood alone, might be taken to indicate that delivery was to be made after transportation. But when read, as it must be, with the advertisement and specifications, and in the light of what was done, it appears with reasonable certainty that delivery at the mines was contemplated. The specifications distinctly show that, if mine delivery should be selected, the coal would be ordered in carload lots and shipped on government bills of lading. In harmony with that provision, the contract required shipment in carload lots on forms of bills of lading furnished by the contracting officer, and bound the United States to pay freight charges from the mine to Mobile. This meant that the contractor was not to be concerned with or responsible for the transportation by rail. But, if delivery

at gulf ports had been selected, the contractor would have been bound to hire the carrier and to pay the freight. The provisions of the contract and specifications together amount to a declaration of the parties that there was to be delivery of the whole quantity at the mine, and the conduct of the parties was in harmony with that purpose and inconsistent with an intention that delivery to the United States should be made after transportation by rail was ended. The general rule is that title passes from seller to buyer with the delivery of the goods. All the coal except that furnished the *Tonopah* was delivered by the seller to the United States at the mines on board railroad cars of appellant, a common carrier designated by the United States by the furnishing of government bills of lading. It must be held that title passed at the time of such deliveries. See *United States* v. *Andrews*, 207 U. S. 229, 240, 243.

The contract contemplated service by the contractor, as well as the sale of coal. The contractor agreed to have the coal transferred from cars to government barges, his compensation therefor to be included in the price, and agreed for specified prices to tow it to points on the Gulf coast, if requested so to do, and also undertook to furnish and deliver at various places some 9,000,000 gallons of fresh water for steam and drinking purposes. The services were not essential to or part of the sale, and, as against the other facts found, the agreements to transfer and tow the coal do not indicate that the parties intended that delivery by the seller to the purchaser should not be made until after transportation. *Hatch* v. *Oil Co.*, 100 U. S. 124, 137; *McElwee* v. *Metropolitan Lumber Co.*, 69 Fed. 302, 305; *H. Baars & Co.* v. *Mitchell*, 154 Fed. 322, 326.

The United States reserved the right to inspect and test the coal after transportation and to reject it, if found not to conform to specifications. None of the coal was

rejected. This right was not inconsistent with transfer of title to the United States at the time of delivery of the coal on cars at the mine. *Delaware, Lackawanna & Western R. R.* v. *United States,* 231 U. S. 363, 371, 372; *Illinois Central R. R.* v. *United States, supra.*

By the contract of August 21, 1916, the seller expressly agreed to deliver the coal on railroad cars at the mines at Dixiana. Deliveries of the coal furnished without formal contracts were covered by specifications which were the same as those forming a part of the contract of March 15, 1915.

The conclusion that the coal furnished the *Tonopah* was to be delivered at the mine is not sustained by the facts found. Under the invitation to bid, proposal and acceptance, delivery was to be made alongside the vessel at Pensacola. The coal was transported on government bills of lading. The United States paid the freight less land-grant deductions. The use of government bills of lading and the payment of reduced charges by the United States are not sufficient to sustain a finding that the coal was the property of the United States when hauled by appellant. There is nothing to indicate that title passed before delivery at the vessel.

We agree with the Court of Claims that acceptance of payment of the land-grant rates concludes appellant. Its conduct was inconsistent with an intention to claim the amount of land-grant deduction, as to any of the coal. Appellant rendered bills as to the coal furnished under the above mentioned contracts of March 15, 1915 and August 21, 1916, upon which it stated the basic rate and the amount to be deducted on account of land grant, and claimed the net remaining after the deduction. There was no evidence tending to show that, in presenting its bills at land-grant rates, appellant did not act with full knowledge of all the facts. Settlements for transporting some of the coal were made after the commencement of

this suit, April 26, 1916, but before the amended and supplemental petition was filed, January 9, 1922. Appellant did not protest against any land-grant deductions. It is bound by its acquiescence and consent and cannot recover the amounts deducted. *Oregon-Washington R. R. Co.* v. *United States,* 255 U. S. 339, 345; *New York, New Haven & Hartford R. R.* v. *United States,* 251 U. S. 123, 127; *New York, New Haven & Hartford R. R.* v. *United States,* 258 U. S. 32; *Louisville & Nashville R. R.* v. *United States,* 258 U. S. 374.

The Court of Claims was right in disallowing additional pay for switching cars to wharves or for transferring coal from cars to boats. The tariff rates on this coal for bunkerage and purposes other than export or coastwise traffic were $1.10 per short ton via Flomaton to Mobile or Pensacola. Under the tariff the cost of transferring such coal from cars to vessels at Mobile and Pensacola was assumed by appellant, where the road-haul revenue was $1 per ton or more; but if such revenue was less there was an additional charge of ten cents per ton, plus $2 per car for switching, subject to a maximum of $1 per ton. After land-grant deduction, the balance to be paid in money was less than a dollar per ton. But the land grant, made many years ago in aid of the railroad enterprise, was not a mere gift or gratuity. See *Burke* v. *Southern Pacific R. R. Co.,* 234 U. S. 669, 679. The carrier's obligation to haul property of the United States at reduced rates was a part of the consideration for which the land grant was made. Part of appellant's compensation for hauling the coal was paid in land, and the balance was paid in money. It cannot be said that the total was less than a dollar per ton.

Judgment affirmed.